No. 99-138-CSX Title: Jenifer Troxel, et vir, Petitioners
v.
Tommie Granville

Docketed: July 20, 1999 Court: Supreme Court of Washington

Entry	Date	Proceedings and Orders
	Jul 6 1999	Petition for writ of certiorari filed. (Response due August 19, 1999)
	Aug 17 1999	Brief of respondent Tommie Granville in opposition filed.
	Sep 1 1999	DISTRIBUTED. September 27, 1999
	Sep 28 1999	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT January 12, 2000. **********
	Nov 12 1999	Joint appendix filed.
	Nov 12 1999	Brief of petitioners Natalie Anne Troxel, et al. filed.
	Nov 12 1999	Brief amici curiae of Washington, et al. filed.
	Nov 12 1999	Brief amicus curiae of American Academy of Matrimonial Lawyers filed.
	Nov 12 1999	Brief amicus curiae of Grandparent Caregiver Law Center filed.
	Nov 12 1999	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Nov 12 1999	Brief amici curiae of AARP And Generations United filed.
	Nov 12 1999	LODGING consisting of twenty copies of appendix material to the amici brief of AARP, et al. submitted by counsel of record.
	Nov 16 1999	Motion of Grandparents United for Children's Rights for leave to file a brief as amicus curiae filed.
	Nov 19 1999	CIRCULATED.
	Dec 2 1999	Motion of Grandparents' United for Children's Rights, Inc. for leave to file a brief as amicus curiae DISTRIBUTED.
	Dec 6 1999	Motion of Grandparents United for Children's Rights for leave to file a brief as amicus curiae GRANTED.
	Dec 8 1999	Brief amicus curiae of Coalition for the Restoration of Parental Rights filed.
	Dec 9 1999	Record filed.
	Dec 10 1999	Brief amici curiae of Northwest Women's Law Center, et al. filed.
	Dec 10 1999	Brief amicus curiae of American Center for Law and Justice filed.
	Dec 10 1999	Brief amicus curiae of Society of Catholic Social Scientists filed.
	Dec 13 1999	Brief of respondent Tommie Granville filed.

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Entry	Date	Proceedings and Orders
	Dec 13 1999	LODGING consisting of twenty copies of legislative and census documents submitted by counsel for the respondent and distributed.
	Dec 13 1999	Brief amici curiae of Lambda Legal Defense and Education Fund, et al. filed.
	Dec 13 1999	Brief amici curiae of Domestic Violence Project, Inc., et al. filed.
	Dec 13 1999	Brief amici curiae of Institute for Justice, et al. filed.
	Dec 13 1999	Brief amicus curiae of National Association of Counsel for Children filed.
	Dec 13 1999	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Dec 13 1999	Brief amici curiae of Christian Legal Society, et al. filed.
	Dec 13 1999	Brief amicus curiae of Center for Children's Policy Practice & Research filed.
	Dec 13 1999	Brief amicus curiae of Center for Original Intent of the Constitution filed.
	Dec 29 1999	Reply brief of petitioners Jenifer Troxel, et vir filed.
	Jan 12 2000	ARGUED.

99 138 JUL 6 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Revised Code of Washington 26.10.160(3) and the former RCW 26.09.240 granting third parties, including grandparents, the right to petition for visitation rights with a minor child if the visitation is "in the best interests of the child" impermissibly interfere with a parent's fundamental interest in the "care custody and companionship of a child" as defined by the liberty and privacy provisions of the United States Constitution?

2. Did the Supreme Court of Washington err in *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), in holding that RCW 26.10.160(3) and the former RCW 26.09.240 are unconstitutional based upon the liberty interest of the Fourteenth Amendment and the fundamental right to privacy inherent in the United States Constitution when it used the flawed premise that a parent's fundamental right to autonomy in child-rearing decisions is unassailable and that the state's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness?

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Jenifer and Gary Troxel (the Troxels) petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINIONS BELOW

The December 24, 1998 Opinion of the Supreme Court of Washington in Case No. 66207-0 attached at Appendix A, page 1a is reported at 137 Wn.2d 1, 969 P.2d 21 (1999). The Troxel Petition for Reconsideration was denied on April 6, 1999 in an Unpublished Order attached at Appendix E, page 81a. The July 28, 1997 Court of Appeals for Washington, Division One, in Case No. 36737-4-I is reported at 87 Wn. App. 131, 940 P.2d 698 (1997). Appendix B, page 55a. The January 3, 1996 Findings of Fact and Conclusions of Law of the Superior Court of Washington for Skagit County, Case No. 93-3-00650-7 is not reported and is attached at Appendix C, page 72a. The May 8, 1995 Visitation Decree of the Superior Court of Washington for Skagit County, Case No. 93-3-00650-7 is not reported and is attached as Appendix D, page 76a.

STATEMENT OF JURISDICTION

The Supreme Court of Washington held that RCW 26.10.160(3) and 26.09.240 (enacted prior to 1996) were unconstitutional pursuant to the "liberty interest" of the Fourteenth Amendment and the right of privacy inherent in the United States Constitution, thereby raising a federal question. (*See* App A, page 23a). On April 6, 1999, the Supreme Court of Washington entered an Order Denying Motion for Reconsideration, (*see* App D, page 76a), thereby terminating review in that court. The jurisdiction of this Court is thus invoked under 28 U.S.C. § 1257.

NOTIFICATION OF STATE ATTORNEY GENERAL

The Washington State Attorney General's Office acknowledges that RCW 26.10.160(3) and RCW 26.09.240 (enacted prior to 1996) were held to be unconstitutional.

STATUTES INVOLVED

Revised Code of Washington 26.10.160(3):

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Former Revised Code of Washington 26.09.240 (prior to 1996 amendments) provides:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

STATEMENT OF THE CASE

Natalie and Isabelle Troxel are the daughters of Brad Troxel and Tommie Granville, who never married. After their

separation, a Decree of Parentage and Parenting Plan was entered between Brad and Tommie regarding Natalie and Isabelle. Brad lived with his parents, Jenifer and Gary Troxel, and the girls regularly visited their father at their grandparents' home.

Brad committed suicide in May 1993. At first the girls continued to visit the Troxels regularly, but their mother soon decided to limit visitation. In December 1993, the Troxels filed a petition pursuant to RCW 26.10.160(3) to obtain visitation rights with their grandchildren. In 1995, the trial court entered a Visitation Decree ordering visitation one weekend per month, one week during the summer, and four hours on each of the Troxels' birthdays. Granville appealed, during which time she married Kelly Wynn, who adopted the girls in February 1996.

Jenifer and Gary Troxel have been married 35 years. Jenifer is an accountant employed as the assistant finance director with the City of Anacortes. Gary is a Longshoreman in Anacortes. Gary was a member of the musical group, the Fleetwoods, while in high school in 1960. The group enjoyed national fame. Gary and the Troxel family continue their love of music. Gary performs with the group, the Fleetwoods, on the East Coast an average of eight times per year. Gary and Jenifer had four children, including their son, Brad. They have five grandchildren. They all live in Skagit County.

Jenifer and Gary Troxel had a close, stable and consistent relationship with Isabelle and Natalie from their births until October 1993, when Tommie restricted their access. In the nearly four years since the entry of temporary orders in April of 1994, Jenifer and Gary and Natalie and Isabelle maintained regular and consistent contact until the Court of Appeals Decision in July 1997.

Tommie Wynn, the children's mother, has six children of her own and two stepchildren. Jessie, Halie, and Roth Granville were born the issue of her relationship with Jeff Granville. Natalie and Isabelle were born of her relationship with Brad Troxel. Riley Wynn was born of her relationship with Kelly Wynn. Kelly Wynn has two children and Tommie is the stepmother of those children: Ryan and Kevin Wynn.

The Court of Appeals reversed the visitation order and dismissed the Troxels' petition for visitation holding that non-parents lack standing to seek visitation unless a custody action is pending. *In re Visitation of Troxel*[1]. The issue of impermissible interference with a parent's constitutionally protected interest in child rearing was raised in the Court of Appeals; however, the court did not reach this question since disposition was based upon lack of standing. (*See* App. B, Page 62a). The Troxels sought and were granted review by the Supreme Court of Washington. The Supreme Court of Washington in its decision *Custody of Smith*,[2] in which *In Re the Matter of Visitation of Troxel* was consolidated with two other cases, reversed the lack of standing holding of the Court of Appeals, but went on to hold RCW 26.10.160(3) and the former RCW 26.09.240 to be unconstitutional. (*See* App. A, page 23a).

1. 87 Wash. App. 131, 940 P.2d 698 (1997). (*see* App. B, page 55a).

2. 137 Wn.2d 1, 969 P.2d 21 (1998).

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL QUESTION.

The Supreme Court of Washington, a court of last resort, has decided an important federal question in a way that conflicts with the decisions of other state courts of last resort. The state court judgment is based upon a federal ground, namely the "liberty interest" of the Fourteenth Amendment and the right of privacy inherent in the United States Constitution. Nonfederal grounds are inadequate to support the state court judgment. The Supreme Court of Washington refrained from an analysis of state constitutional grounds because the Washington constitution affords no greater protection than the federal constitution in this area.[3] Therefore, a federal question was presented; the disposition of that question was necessary to the determination of the case; the federal question was actually decided and the judgment could not have been rendered without deciding it.[4] It is the responsibility of the United States Supreme Court to determine for itself the answer to the question of whether the state court judgment is based upon a nonfederal ground and whether a nonfederal ground is adequate to support the state court judgment.[5] The answer to both questions should be no.

3. *Smith*, 131 Wn.2d at page 34. (*see* App. A, page 41a).

4. *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206 (1938).

5. *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956).

II.

THE STATE COURTS DISAGREE.

Grandparent and third party visitation is a burgeoning area of the law. In 1985, the national survey of family law in the United States published each year in the Family Law Quarterly referred to the enactment of grandparent visitation statutes as a "recent phenomenon." By 1993 — just eight years later — every state in the United States had adopted a statute providing either specifically for grandparent visitation or generally for visitation rights of third parties over the objection of the parents.[6] Seventy-five percent (75%) of all older Americans are now grandparents.[7] Interest and demand for this issue grows with the growth of the older population.

State courts are divided on the standard of review which should be applied to third party/grandparent visitation statutes. The Supreme Court of Washington in *Custody of Smith*[8] has applied a strict scrutiny analysis to the application of Washington's third party visitation statutes which require a judicially determined finding that the visitation is in the "best

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6. Cynthia L. Greene, *Grandparents' Visitation Rights: Is the Tide Turning?*, Journal of the American Academy of Matrimonial Lawyers, Vol. 12, Page 51 (Summer 1994).

7. Jorge M. Cestero, *Happiness is Being a Grandparent? The Evolution of Grandparent Visitation in Florida*, The Florida Bar Journal/November 1997.

8. All references to the decision from which this review is taken will be made to *Custody of Smith* with the understanding that the action to which the Troxels are a party, namely, *Visitation of Troxel*, was consolidated by the Supreme Court of Washington with *Custody of Smith* and *Visitation of Wolcott*.

interests of the child". The court's decision relies on *Meyer v. Nebraska*, in which the United States Supreme Court recognized a constitutionally protected interest of parents to raise their children without state interference.[9] The court recognized this interest as being a fundamental "liberty" interest protected by the Fourteenth Amendment and also as a fundamental right derived from the privacy rights inherent in the United States Constitution.[10] Consequently, it held that where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interest is narrowly drawn to meet only the compelling state interest involved.[11] The court held that, based upon United States Supreme Court precedent, some harm must threaten the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her own child. The court held that the "best interests of the child" standard of the third party visitation statutes do not contemplate any harm or potential harm to the child which must be prevented by granting third party visitation rights. Accordingly, the parens patriae authority does not justify the interference with parental rights permitted by the statutes in question.[12]

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9. 262 U.S. 390, 399, 43 S. Ct. 628, 67 L. Ed. 1042 (1923). *Custody of Smith*, 131 Wn.2d at page 13, (App. A, page 12a).

10. *Custody of Smith*, 131 Wn.2d at page 15, (App. A, page 14a-15a).

11. *Custody of Smith*, 131 Wn.2d at page 15, citing *Roe v. Wade*, 410 U.S. 113, 115, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). (App. A, page 15a).

12. *Custody of Smith*, 131 Wn.2d at page 19. (App. A, page 20a).

The Washington Supreme Court joins other states in this analysis. It cited with approval *Hawk v. Hawk*[13] and *Brooks v. Parkerson*.[14] In these two cases, Tennessee and Georgia declared their grandparent visitation statutes violative of the United States Constitution.[15] *Hawk* was also decided on state constitutional grounds. Connecticut's statute, Conn. Gen. Stat. Ann. § 46B-59 (West 1986) has also been challenged.[16]

In contrast, Kentucky, Utah, New Hampshire and Indiana have applied a "best interests of the child" test. Kentucky's broadly written, open ended grandparent visitation statute[17]

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13. 855 S.W.2d 573, 580 (Tenn. 1993).

14. 454 S.E.2d 769 (Ga. 1995), *cert. denied*, 516 U.S. 942, 116 S. Ct. 337, 113 L. Ed. 2d 301 (1995).

15. *Brooks*, 454 S.E.2d at 776.

16. *Castagno v. Wholean*, 239 Conn. 336 (1996).

17. Ky. Rev. Stat. 405.021 Reasonable Visitation Rights To Grandparents.

> (1) The Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so. Once a grandparent has been granted visitation rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so.
>
> (2) The action shall be brought in Circuit Court in the county in which the child resides.

(Cont'd)

was at issue in *King v. King*.[18] In *King*, the United States Supreme Court denied a request to review a Kentucky Supreme Court decision that interpreted the Kentucky grandparent visitation statute, Ky. Rev. Stat. § 405.021 (Baldwin 1991), to allow a paternal grandfather to visit with his grandchild twice weekly against the wishes of the child's married, fit and natural parents. It is asserted that the United States Supreme Court's decision not to hear *King* and thus to allow the Kentucky Statute to stand as constitutional is an indication that the United States Supreme Court will not agree with the analysis used in *Hawk*, *Brooks* and *Smith*. Washington's third party visitation statute is an open-ended statute similar to Kentucky's grandparent visitation statute, except that Washington's statute permits "any person" "at any time" to petition for visitation rights when visitation may serve the "best interest of the child" RCW 26.10.160(3).

The dissent in *Smith*[19] stated that reliance on *Wisconsin v. Yoder*[20] is misplaced because *Yoder* turned on the free exercise

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(Cont'd)

> (3) The Circuit Court may grant noncustodial parental visitation rights to the grandparent of a child if the parent of the child who is the son or daughter of the grandparent is deceased and the grandparent has assumed the financial obligation of child support owed by the deceased parent, unless the court determines that the visitation is not in the best interest of the child. If visitation is not granted, the grandparent shall not be responsible for child support.

18. 828 S.W.2d 630 (Ky. 1992), *cert. denied*, 113 S. Ct. 378 (1992).

19. *Custody of Smith*, 131 Wn.2d at page 31, (App. A, page 35a-36a).

20. 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

claim asserted by the Amish parents and the unique facts of that case. Justice Talmadge wrote in his dissent that the United States Supreme Court did not hold that harm is a threshold requirement for any encroachment upon parental rights as the majority in *Smith* implied; but rather notes even where the circumstances of a particular case provide heightened protections for parental rights, the extreme circumstances of harm to the child clearly justifies state intervention. *Yoder* held the the state may intervene when the parent threatens harm to a child. *Yoder* did not hold that the state must prove a threat of harm to a child before it could intervene.[21] In grandparent and third party visitation cases, the grandparent or the third party initiates the intervention. Initiation is taken by persons in relationship with and acting in the best interests of the minor child. The state does not initiate these actions as they did in *Yoder* and *Prince*.[22] No definite boundary has been drawn. This issue has not been squarely before this Court. The boundary line should be drawn under the facts of this case.

Other states have also upheld the constitutionality of grandparent visitation statutes. In *Campbell v. Campbell*,[23] the Utah Court of Appeals noted that the majority of courts that have addressed the constitutionality of grandparent visitation statutes authorizing visitation if in the best interest of the child, have upheld those statutes as constitutional.[24] The Indiana Court of Appeals upheld Indiana's grandparent visitation act against a federal constitutional challenge. The court held that

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21. 406 U.S. 205 at pages 233-34.

22. 321 U.S. 158 at pages 170-71 (1944).

23. 869 P.2d 635 (Utah App. 1995).

24. *Campbell*, 869 P.2d at page 644, note 18.

visitation rights by grandparents are less than a substantial encroachment on the parent's fundamental rights and the Act is therefore a legitimate exercise of the state's parens patriae power.[25] New Hampshire recognized in *Roberts v. Ward* [26] that even absent specific statutory authority a court may exercise its parens patriae power to act in a child's best interest regarding visitation matters.

Justice Talmadge noted in his dissent in *Smith* that the "best interest of the child" standard is sufficient because the factors for consideration required in the trial court's exercise of judicial discretion are clearly subsumed under the "best interest of the child" determination.[27] The "best interest of the child" standard depends on a highly fact specific inquiry that cannot be reduced to a mathematical formula. To do so would be violative of the child's uniqueness in person and in its circumstances and relationships.

Where the states are divided regarding the constitutionality of grandparent visitation statutes, the issue is ripe for review.

III.

ADDRESSING THE WELFARE OF OUR CHILDREN AND PRESERVING THE FAMILY IN THE FUTURE.

The majority in *Smith* has idealized the "basic family unit". A conservative judiciary has defined the traditional concept

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25. *Sightes v. Barker*, 684 N.E.2d 224 (Ind. App. 1997), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997).

26. 126 N.H. 388, 493 A.2d 478 (1995).

27. *Custody of Smith*, 131 Wn.2d at page 37-38 (App. A, page 46a).

of a family as a heterosexual man and woman who bear and raise children inside the legal institution of marriage. The "nuclear family" or "basic family unit" is really only a recent phenomenon of modern civilization. The family, over eons, has consisted of multi-generations living together in one home or community. Inter-generational families have been the norm for a longer period of time than the modern "nuclear family" has existed. The Kentucky Supreme Court in *King* states that the intent of its statute is to preserve the family by strengthening family bonds.[28]

Does the "nuclear family" truly represent the "core element of civilization" as *Smith* asserts.[29] Maybe during the past 70 years it has, but this definition would not be accurate for the period of time prior to the industrial revolution and may not be true for the evolving family of the future.

The fact is, there has been a dramatic erosion of the "stable basic family unit". The erosion of the modern "nuclear family" is a result of multiple marriages and divorces, the increased bearing of children outside of marriage, long-term cohabitation relationships among couples with alternative sexual preferences, geographical separation from extended family members, the changing social economic role of women, and the new reproduction technologies.[30] New reproductive technology and genetic paternity testing has made multiple mothers and fathers possible for a child under traditional

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28. *King*, 828 S.W.2d at 632.

29. *Custody of Smith*, 131 Wn.2d page at 13-15, (App. A, page 14a).

30. *See* Shapiro, "*Non-Traditional Families in the Courts: The New Extended Family*," The Journal of the American Academy of Matrimonial Lawyers, Volume II, Winter 1993).

biological or legal definitions.[31] It has been said that there are now 16 different reproductive combinations in addition to traditional conception in childbirth.[32]

Are the courts and our society equipped to deal with modern life using the traditional view of the family? The conservative judicial view of the "basic stable family unit" as expressed in *Smith* may even be unintentionally racial or socioeconomically based. The states' courts and legislatures are grappling with elemental definitions in an area of dynamic change which touches the lives of every citizen of our country.

IV.

EFFECTS OF ADOPTION ON THE RIGHT TO VISITATION.

A review of *Custody of Smith* will also necessarily involve addressing the issue of whether a step-parent adoption terminates the rights of grandparents. In *Visitation of Troxel*, after their marriage, Granville's husband, Kelly Wynn, adopted Natalie and Isabelle in their attempt to cut off any visitation rights by the Troxels under the fresh start policy of RCW 26.26.[33] If this Court rules in favor of the Troxels, upholding

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31. *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

32. *See* John L. Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353, 355 (1991) cited by Shapiro, *"Non-Traditional Families in the Courts: The New Extended Family"*, The Journal of the American Academy of Matrimonial Lawyers, Volume II, Winter 1993) at page 121.

33. *Custody of Smith*, 131 Wn.2d. at page 6, (App. A, page 3a).

the constitutionality of visitation statutes, then the issue of infringement upon an adoptive step-parent's rights will have to be addressed.[34] Indiana held that permitting grandparent visitation over an adoptive parent's objection does not constitutionally impinge on the integrity of the adoptive family.[35]

V.

JUDICIAL DISCRETION.

The issue is whether or not the open ended statutes of Washington and Kentucky and their reliance upon application of the "best interest of the child" standard and reliance upon judicial discretion is sufficient. In the case of *Adoption of Hugo*,[36] currently on petition to the United States Supreme Court for writ of certiorari, also addresses this issue, but from a different direction.

The Supreme Judicial Court of Massachusetts stated:

> The "best interest of a child" is a question that presents the trial judge "with a classic example of a discretionary decision".[37]

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34. *See Custody of B.S.Z.-S.*, 74 Wn. App. 727, 875 P.2d 693 (1994) and *In re Marriage of Aragon*, 764 P.2d 419, Colo. Ct. App. (1988). *H.F. v. T.F.*, 483 N.W.2d 803, 804-806 (Wisc.), *cert. denied*, 113 S. Ct. 408 (1992).

35. *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. Ct. App.), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997).

36. 428 Mass. 219, 700 N.E.2d 516 (1998).

37. 428 Mass. at page 225.

The Supreme Judicial Court of Massachusetts decided not to adopt a general presumption in favor of maintaining a sibling relationship in child custody cases, instead deciding to rely upon judicial discretion based upon the "best interests of the child". A case by case application of "the best interests of the child" standard can insure the welfare of each child in light of the circumstances of each "family".

VI.

WHAT DOES THE FUTURE HOLD?

Crucial in this area of law is that each child be considered as a unique human being and that a child's unique circumstances be considered on a fact specific or case by case basis. Preservation of a parent's fundamental rights is a laudable goal; however, the welfare of children who may be cut off or isolated from loving contact with a significant parenting figure in their lives is of a higher importance. Recent events indicate that it may be time to pay more attention to our children's state of mind than a parent's rights. The right of privacy emanating from *Griswold* came from the concept of a penumbra of rights giving rise to the right of privacy.[38] The issue before this Court is whether there is also an equal penumbra of responsibilities by parents to sustain loving and nurturing relationships between their children and third parties, in spite of difficulties between adult family members and particularly in honor of deceased parents and their familial ties.

Present variation among statutes throughout the United States and the lack of guidance from Congress or this Supreme Court has created difficulties for both parents and grandparents

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38. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

in determining their respective roles in the lives of their children. These inconsistencies and ambiguities have created particular hardships for the children caught in a family tug-o-war. Although the courtroom is not the ideal forum to resolve family disputes, it has become the last resort for the settlement of grandparent visitation disputes.[39] Congress has considered grandparent rights legislation.[40] Article 1, Section 8 of the Constitution enumerates the areas in which Congress may legislate and family matters and grandparent visitation do not fall within any of congress' enumerated powers under the Tenth Amendment.[41]

VII.

WHAT REVIEW WILL PROVIDE.

Because of the breadth of the Washington Statutes, this Court will be able to provide significant guidance to the fifty states. Any decision by this Court will have far reaching effects. Review of the constitutionality of RCW 26.10.160(3) will provide the United States Supreme Court with the broadest opportunity to look at this complex and emotional family issue that it may ever have in reviewing the grandparent/third party visitation issue. RCW 26.10.160(3) granted rights to petition for visitation in the following and other situations:

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39. Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights*, 43 American University Law Review, 563, 587-588 (1994).

40. *Id.* at 587-588. (Ms. Jackson reviews in her article excerpts of House Hearings regarding grandparent visitation).

41. U.S. Const. amend. X. "The powers not delegated to the United Sates by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

1. *Grandparents.* Where grandparents have provided nurturing care for children and have maintained close family ties in situations where the parents were unable to provide care for their children or in some way fostered close connections; or where there has been a tragic death of a parent and the continuation of inter-generational ties are sought.

2. *Step-parents.* In situations where a child born out of wedlock, whose father "disappears" and whose mother remarries and has more children of that marriage and whose step-father is the only "father" the child has ever known; who loves and is close to his/her siblings and then when the child's mother dies of disease or accident and the biological father appears on the doorstep to claim his child, the former "step-father" now has no right to visit his "oldest child" and the child has no right to see his siblings?

3. *Biological vs. Presumptive Fathers.*

4. *Surrogate/biological Mothers vs. Legal Mothers.*

5. *Parental Figures in Same Sex Relationships.*

The European Convention's approach to grandparent visitation seeks to preserve family relationship. It replaced the term *parental authority* with the term *parental responsibility* in the European Convention on the Exercise of Children's Rights 1995.[42] The Wiertz-Wezenbeek article suggests that *parental authority* should be replaced with *parental responsibility* in recognition that children's views and wishes should be taken into account.

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42. Wiertz-Wezenbeek, *Visitation Rights of Nonparents and Children in England and the Netherlands*, Family Law Quarterly, volume 31, Number 2, 1997.

In France, grandparents do have visitation rights with their grandchildren and do not have to demonstrate the existence of a family life. Visitation is denied whenever the parents show that the visitation is not in the child's best interests.[43]

The Convention and the rulings of the Commission are referred to because their approach introduces the perspective of family life in a broader sense. While the result may seem at odds with the majority's decision in *Smith*, its goal may be similar. If the protection of the "core element" of our civilization, the family is paramount, then ought not grandparents who can demonstrate a *close family relationship* with their grandchildren be able to maintain that contact if it is in the "best interests of the child?" Don't parents who have participated or even created and tested these relationships have a responsibility to maintain this contact? Aren't families in this approach being preserved?

Margaret Mead, the noted anthropologist, stated in 1978:

> Nobody has ever before asked the nuclear family to live all by itself in a box the way we do, with no relatives, no support. We've put [the family] in an impossible situation.

The question becomes whether the Fourteenth Amendment and the right of privacy is protecting the "nuclear family" or isolating it.

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43. Wiertz-Wezenbeek, *Visitation Rights*, *supra* at page 360.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF WASHINGTON DATED AND DECIDED DECEMBER 24, 1998 IN *CUSTODY OF SMITH*, 137 Wn. 2d 1

[Nos. 65605-3; 65699-1; 66207-0. En Banc.]
Argued March 11, 1998. Decided December 24, 1998.

In the Matter of the Custody of SARA SKYANNE SMITH.

EDISON SMITH, ET AL., *Respondents*, v. KELLY STILLWELL-SMITH, *Appellant*.

In the Matter of the Visitation of JUSTIN ROSS WOLCOTT, DAVID L. CLAY, *Petitioner*, and LISA WOLCOTT, *Respondent*.

In the Matter of the Visitation of NATALIE ANNE TROXEL, ET AL, JENIFER TROXEL, ET AL., *Petitioners*, and TOMMIE GRANVILLE, *Respondent*.

• • •

MADSEN, J. — The issues presented in these three consolidated cases are whether petitioners had standing to petition for visitation under either RCW 26.10.160(3) or former RCW 26.09.240 and whether these statutes violate the parents' constitutionally protected interest in raising their children without state interference. We conclude petitioners have standing but, as written, the statutes violate the parents' constitutionally protected interests. These statutes allow any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm.

Appendix A

STATEMENT OF THE CASE

Wolcott. Justin Wolcott was born April 10, 1986. After Justin was born, Justin's mother, Lisa, began a relationship with David Clay. The three lived together from May 1988 until 1992. After Wolcott and Clay separated, Clay continued to see Justin. However, relations between Wolcott and Clay deteriorated and, in November, Clay petitioned pursuant to RCW 26.10.160(3) to establish visitation rights with Justin. A court commissioner entered a temporary order allowing visitation every other weekend. On motion for revision, Judge Wilson reduced visitation to one Saturday per month. Wolcott appealed that order to Division One, arguing that Clay lacked standing to seek visitation. Commissioner Ellis dismissed the appeal because no final appealable order had been entered. He also found no obvious or probable error and denied discretionary review.

Following a trial in October 1995, Judge Hansen dismissed Clay's petition for visitation holding that Clay lacked standing to seek visitation because he is not related to Justin and no custody action was pending. The court awarded Wolcott her attorneys fees. The Court of Appeals affirmed and awarded Wolcott additional attorneys fees for the appeal. *In re Visitation of Wolcott*, No. 37883-0-I, slip op. at 11 (Wash. Ct. App. Mar. 24, 1997). Clay sought and was granted review by this court.

Troxel. Natalie and Isabelle Troxel are the daughters of Brad Troxel and Tommie Granville, who never married. After their separation, Brad lived with his parents, Jenifer and Gary Troxel, and the girls visited their father at their

Appendix A

grandparents' home on occasion. Brad committed suicide in May 1993. At first the girls continued to visit the Troxels regularly, but their mother soon decided to limit visitation. In December 1993, the Troxels filed a petition pursuant to RCW 26.10.160(3) and former RCW 26.09.240 to obtain visitation rights with their grandchildren. In 1995, the trial court entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on each of the Troxels' birthdays. Granville appealed, during which time she married Kelly Wynn, who adopted the girls in February 1996. The Court of Appeals remanded for entry of findings of fact and conclusions of law, which were entered in January 1996.

The Court of Appeals subsequently reversed the visitation order and dismissed the Troxels' petition for visitation holding that nonparents lack standing to seek visitation unless a custody action is pending. *In re Visitation of Troxel*, 87 Wn. App. 131, 940 P.2d 698 (1997). The Troxels sought and were granted review by this court.

Smith. Brian Smith and Kelly Stillwell were married in 1989. In 1992, Stillwell gave birth to daughter, Sara, conceived through artificial insemination (Brian was not the donor). In 1995, Stillwell petitioned for dissolution of the couple's marriage. Both parties sought custody of Sara. On February 25, 1996, Stillwell's mother went to Brian's home and shot him. Brian fired back, and they were both killed. A dispute then developed between Stillwell and Brian's surviving family members (his parents, brother, and sister) regarding when and to what extent Sara should have contact with them. Consequently, the Smith family

petitioned for visitation rights with Sara. Following a trial held in April 1997, the trial court granted the petition, under former RCW 26.09.240, and established a visitation schedule. Stillwell appealed the order to Division One of the Court of Appeals. The court granted the Smiths' motion to transfer the appeal to this court. All three cases were consolidated for review.

DISCUSSION

The parties in this case sought visitation rights pursuant to RCW 26.10.160(3) and former RCW 26.09.240, both of which address visitation rights of nonparents. RCW 26.10.160(3) provides:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Former RCW 26.09.240 (prior to 1996 amendments) provides:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances.
>
> A person other than a parent may petition the court for visitation rights at any time.

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

The question before this court is whether a nonparent petitioner has standing pursuant to RCW 26.10.160(3) or former RCW 26.09.240 to petition for visitation with a child outside the context of custody or dissolution proceedings. Even if the nonparent petitioners do have standing to sue, appellant, Kelly Stillwell, argues that the statutes impermissibly violate a parent's fundamental right to autonomy in child-rearing matters.

STANDING

At issue in each of these cases is whether RCW 26.10.160(3) and former RCW 26.09.240 permit a nonparent to seek visitation in the absence of a custody proceeding. The parents argue that the question should be answered in the negative and ask this court to find that the individuals who petitioned for visitation rights lack standing under the applicable statutes. The petitioners respond stating that the plain meaning of RCW 26.10.160(3) and former RCW 26.09.240 allow them to petition for visitation absent a custody proceeding noting that both statutes allow "any person" to petition for visitation at "any time." We hold that the plain language of the statutes gives Clay and the Troxels standing to petition for visitation rights under RCW 26.10.160(3) and the Smiths standing to petition for visitation under former RCW 26.09.240.

In answering the question before this court we must interpret the meaning of RCW 26.10.160(3) and former

RCW 26.09.240. We review questions of statutory construction de novo. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993). The purpose of statutory interpretation is to determine and give effect to legislative intent. *Duke v. Boyd*, 133 Wn.2d 80, 87-88, 942 P.2d 351 (1997). Legislative intent is primarily determined from the statutory language. *Id.*

> When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written. Although the court should not construe statutory language so as to result in absurd or strained consequences, neither should the court question the wisdom of a statute even though its results seem unduly harsh.

Id. at 87 (citations omitted). This court has emphasized that it will not construe unambiguous language and that it "assume[s] that the legislature means exactly what it says." *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991)).

Both RCW 26.10.160 and RCW 26.09.240 address the rights of nonparents to seek visitation with a child. Both statutes have been amended several times, most recently in 1996. As originally enacted in 1973, as part of a chapter having mainly to do with parenting plans in dissolution actions, former RCW 26.09.240 provided that a parent not granted custody of a child is entitled to reasonable visitation rights unless visitation would endanger the child's health.

It also said, "[t]he court may order visitation rights for any person when visitation may serve the best interest of the child." Laws of 1973, 1st Ex. Sess., ch. 157, § 24. In 1976, the Court of Appeals held the phrase "any person" did not authorize trial courts to grant visitation rights to "third person," including grandparents, absent a change of circumstances, such as death of one or both parents or termination of the nuclear family unit. *Carlson v. Carlson*, 16 Wn. App. 595, 597, 558 P.2d 836 (1976).

The following year, the Legislature amended RCW 26.09.240 to read: "The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change in circumstances. Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings." Laws of 1977, 1st Ex. Sess., ch. 271, § 1. The statute retained its original language regarding visitation rights of parents denied custody.

In 1987, the Legislature adopted an extensive bill regarding parenting, child custody and child support. Laws of 1987, ch. 460. One section of that bill amended RCW 26.09.240 to omit references to visitation rights of parents denied custody and also to delete the phrase "including, but not limited to, custody proceedings." Laws of 1987, ch. 460, § 18. Thus, as amended, RCW 26.09.240 read, "The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances. Any person may petition the court for visitation rights at any time." *Id.*

In another section of this bill, the Legislature created a new statute which overlapped both the old and new versions of RCW 26.09.240. This new statute gave presumptive visitation rights to parents denied custody and allowed trial courts to order visitation rights "for any person" to petition for such rights "any time including, but not limited to, custody proceedings." LAWS OF 1987, ch. 460, § 44. Although this statute dealt with visitation rights of both parents and nonparents, it was codified as RCW 26.10.160, in a new chapter titled "Nonparental Actions for Child Custody." LAWS OF 1987, ch. 460, § 25.

In 1989, the Legislature amended RCW 26.10.160 to clarify the circumstances under which a parent who is denied custody may be allowed visitation. LAWS OF 1989, ch. 326, § 2(1), (2). That amendment also divided the statute into four subsections, and placed the language regarding nonparent visitation rights in subsection (3). LAWS OF 1989, ch. 326, § 2(3). This subsection still permitted "any person" to seek visitation "at any time" including, but not limited to custody proceedings "whether or not there has been any change of circumstances." LAWS OF 1989, ch. 326, § 2(3). That same session, the Legislature also amended RCW 26.09.240 to permit "a person other than a parent" (rather than "any person") to petition for visitation. LAWS OF 1989, ch. 375, § 13.

In 1994, the Legislature amended RCW 26.10.160 to further clarify the circumstances under which parents denied custody may be allowed (or denied) visitation. LAWS OF 1994, ch. 267, § 2. The Legislature made no changes to the subsection of the statute allowing "any person" to petition

for visitation "at any time including, but not limited to, custody proceedings." LAWS OF 1994, ch. 267, § 2(3).

In 1996, the Legislature again amended both RCW 26.09.240 and RCW 26.10.160. RCW 26.09.240 now requires any nonparent seeking visitation to show that he or she has a significant relationship with the child. It also states that a "person other than a parent may not petition for visitation under this section unless the child's parent or parents have commenced an action under this chapter," which includes an action for dissolution of marriage, legal separation or modification of a parenting plan proceeding. LAWS OF 1996, ch. 177, § 1(1). As amended, RCW 26.09.240(6) also contains a list of factors for the trial court to take into consideration when making a determination of the child's best interests. Some of these factors are the strength of the relationship between the child and the petitioner, the relationship between the child's parents and the petitioner, the nature and reason for the parent's objection to visitation, and any criminal history or history of physical, emotional or sexual abuse or neglect by the petitioner. Additionally, the restrictions that apply under RCW 26.09.191 to parents also apply to a petitioner or intervenor who is not a parent. RCW 26.09.240(7).

The 1996 Legislature amended RCW 26.10.160 again to clarify the visitation rights of parents denied custody. LAWS OF 1996, ch. 303, § 2(1)-(2). The Legislature made no changes to subsection (3) of this statute, dealing with petitions for visitation by "any person" "at any time including, but not limited to, custody proceedings. . . .

whether or not there has been any change of circumstances." LAWS OF 1996, ch. 303, § 2(3). There is no language limiting actions under RCW 26.10.160(3) in the manner they are limited under RCW 26.09.240.

Although the plain language of RCW 26.10.160(3) allows "any person" to petition for visitation "at any time," the Court of Appeals in *Wolcott* and *Troxel* relied on the 1996 changes in comparable language in RCW 26.09.240 as a basis for avoiding the plain language of the statute. *Wolcott*, 85 Wn. App. at 473; *Troxel*, 87 Wn. App. at 136. The court in *Wolcott* stated it could not "conceive of any reason why the Legislature did not similarly amend RCW 26.10.160(3), a virtually identical provision in the parallel statute." *Wolcott*, 85 Wn. App. at 473. The court, therefore, found that the Legislature unintentionally overlooked amending RCW 26.10.160(3). To correct that perceived oversight, the court deleted the provision of RCW 26.10.160(3) allowing "any person" to petition for custody at "any time including, but not limited to, custody proceedings" and replaced it with the 1996 amendment to RCW 26.09.240 prohibiting nonparents from bringing a visitation action "unless the child's parent or parents have commenced an action under this chapter." RCW 26.09.240(1). As interpreted by the Court of Appeals, both sections would prohibit nonparent visitation action under either chapter unless a custody proceeding is pending.

Our concern with the Court of Appeals analysis is its reluctance to address the plain language of RCW 26.10.160(3). Although the Legislature amended RCW 26.09.240 and other sections of RCW 26.10.160, it left

RCW 26.10.160(3) untouched. By its plain language, RCW 26.10.160(3) gives nonparents an avenue to obtain visitation rights with children outside of a custody proceeding. We decline to construe the language of RCW 26.10.160(3) because we find that the language of the statute is unambiguous. Further, we will not read qualifications into the statute which are not there. A "court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission." *Automobile Drivers & Demonstrators Union Local 882 v. Department of Retirement Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379 (1979) (citing *Jepson v. Department of Labor & Indus.*, 89 Wn.2d 394, 573 P.2d 10 (1977)); *accord State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982); *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981). Thus, the petitioners in *Wolcott* and *Troxel* had standing to petition for visitation under RCW 26.10.160(3).

In *Smith*, application of former RCW 26.09.240 yields the same result. Appellant, Kelly Stillwell, asserts the trial court had no authority to order visitation with her daughter by third parties (the Smiths) outside of an action for custody or allegation she is an unfit mother.

However, when the Smiths filed their petition for visitation, RCW 26.09.240 did not require the existence of a pending action under RCW 26.09 as a precondition to a nonparents visitation petition. Former RCW 26.09.240 allowed "[a] person other than a parent" to "petition the court for visitation [rights] at any time." Thus, under the plain language of the statute, the Smiths could petition the

court for visitation rights "at any time," as the trial court properly held.[1]

CONSTITUTIONALITY OF RCW 26.10.160(3) AND FORMER RCW 26.09.240

In *Wolcott* and *Troxel*, the Court of Appeals rewrite of RCW 26.10.160(3) is based on its concern that a literal reading of the statute would have the "intolerable" consequence of "stable families" being "forced to defend in court against visitation petitions having no basis." *In re Visitation of Wolcott*, 85 Wn. App. 468, 472, 933 P.2d 1066 (1997); *see also In re Visitation of Troxel*, 87 Wn. App. 131. While the statute as written may have potentially troubling consequences for stable families, this does not justify Court of Appeals rewriting of the statute.

Nevertheless, it is undisputed that parents have a fundamental right to autonomy in child rearing decisions. The United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without state interference. *See Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 (1923) (The liberty interest guaranteed by the Fourteenth Amendment includes freedom "to engage in any of the common occupations of life, to acquire useful

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1. The trial court found that the petition for visitation was governed by the version of RCW 26.09.240 that was in effect when their action was filed on April 3, 1996. The court held that the language added to the statute by the 1996 amendment was not applicable since the amendment was not effective until June 6, 1996.

knowledge, to marry, establish a home and bring up children . . . ."); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468 (1925) (law prohibiting parents from sending children to private as opposed to public school unconstitutional because it would "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of [their] children . . . ."); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (Court recognized that "the custody, care and nurture of the child reside first in the parents. . . . it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter."); *Wisconsin v. Yoder*, 406 U.S. 205, 235-36, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (exempting Amish from the state compulsory education law requiring children to attend school beyond the eighth grade); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (in determining the standard of proof necessary in termination of parental rights case, the Court noted its "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.")

The Supreme Court defined the nature of this constitutionally protected interest in *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), when it held unconstitutional an Illinois law which declared that, upon the death of the mother, children of unwed fathers become wards of the state:

> The private interest here, that of a man in the children he has sired and raised, undeniably

warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man' . . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment . . . .

(Citations omitted.)

The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts. The safeguarding of familial bonds is an innate concomitant of the protective status accorded the family as a societal institution. A parent's constitutionally protected right to rear his or her children without state interference, has been

recognized as a fundamental "liberty" interest protected by the Fourteenth Amendment and also as a fundamental right derived from the privacy rights inherent in the constitution. Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved. *See Roe v. Wade*, 410 U.S. 113, 155, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *O'Hartigan v. Department of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991); *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

In answering whether the state visitation statutes at issue serve a compelling state interest we must understand the sources of state power to intrude on family life. The state may act pursuant to its authority to protect citizens from injuries inflicted by third persons or to protect its citizens from threats to health and safety. Thus, in the context of family life, the state's police power gives it the authority to require the vaccination of children against communicable diseases over the objection of their fit parents. *See Prince*, 321 U.S. at 166-67. Similarly, the state may step in and override a decision of a parent where the decision would harm the child. *In Prince v. Massachusetts*, for example, the Supreme Court refused to invalidate legislation which prohibited a parent from permitting a minor to sell merchandise on a public street. *Prince*, 321 U.S. 158. Although the Court acknowledged the parent's constitutionally protected right to child-rearing autonomy, it found a narrow exception necessary in light of the "crippling effects of child employment," "more especially in public places." *Id.* at 168. Police power thus empowered

the state to intrude on a parental decision in the interests of society as a whole where the decision directly and severely imperiled the child.

The state's other source of authority to intrude on a family's autonomy is its parens patriae power. As parens patriae the state acts from the viewpoint and in the interests of the child. Like the state's police power the state may act only pursuant to its parens patriae power where a child has been harmed or where there is a threat of harm to a child. *See Yoder*, 406 U.S. at 206. Both parens patriae power and police power provide the state with the authority to act to protect children lacking the guidance and protection of fit parents of their own, and although they may represent different perspectives, both contemplate harm to the child and, in practical terms, have been used nearly interchangeably in the fashioning of a threshold requirement of parental unfitness, harm, or threatened harm. *See* Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29 (1996).

For example, in *Yoder*, the Supreme Court held that the First and Fourteenth Amendments prevented the state from compelling Amish parents to send their children to public school after completion of the eight grade. *Yoder*, 406 U.S. at 205. The state argued, based on the Court's prior decision in *Prince*, that such a decision fails to give due regard to the power of the state as parens patriae to extend the benefit of the secondary education to children regardless of the wishes of their parents. *Yoder*, 406 U.S. at

229. The Court explained that in *Prince*, the Legislature was within its authority to curtail the evils associated with child labor. *Id.* at 230. But unlike *Prince*, the case presented in *Yoder* was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.*

These parties who have petitioned for visitation rights argue that former RCW 26.09.240 and RCW 26.10.160(3) serve a compelling state interest that warrants use of the state's parens patriae power to impose visitation with third persons where the visitation serves the "best interest of the child." Petitioners contend that a judicially determined finding that visitation is in the best interests of the child is a sufficiently compelling justification to override a parent's opposition, regardless of the fact that the parent's fitness is not challenged or that there has been no showing of harm or threatened harm to the child.

However, the Supreme Court cases which support the constitutional right to rear one's child and the right to family privacy indicate that the state may interfere only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Yoder*, 406 U.S. at 234. In *Yoder*, for example, the Court deemed significant the fact that Amish children would not be harmed by receiving an Amish education rather than a public education. *Yoder*, 406 U.S. at 230. Likewise, in *Pierce*, the Court found that parents' decisions to send their children to private schools were "not

inherently harmful," as there was "nothing in the . . . records to indicate that [the private schools] have failed to discharge their obligations to patrons, students, or the state." *Pierce*, 268 U.S. at 534. In *Meyer*, a case in which a teacher had been convicted of teaching a child German, the Court found that "proficiency in a foreign language . . . is not injurious to the health, morals or understanding of the ordinary child," and thus the state's desire "to foster a homogeneous people with American ideals" was insufficient justification for forbidding foreign language instruction. *Meyer*, 262 U.S. at 402-03. In *Stanley*, the Court required an individualized finding of parental neglect before stripping an unwed father of his parental rights. 405 U.S. at 645. On the other hand, the Court upheld the conviction of the mother who allowed her child to sell magazines, approving state interference designed to prevent "psychological or physical injury" to the child. *Prince*, 321 U.S. at 170. It is clear from Supreme Court precedent that some harm threatens the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child.

Washington has followed suit, allowing state interference with parents' rights to raise their children only where the state seeks to prevent harm or a risk of harm to the child. This court has emphasized that a state can only intrude upon a family's integrity pursuant to its parens patriae right when "parental actions or decisions seriously conflict with the physical or mental health of the child." *In re Welfare of Sumey*, 94 Wn.2d at 762 (citing *Parham v. J.R.*, 442 U.S. 584, 603, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979); *Yoder*, 406 U.S. at 230).

In *Sumey*, parents were temporarily denied custody of their child pursuant to former RCW 13.32,[2] which allowed for the temporary alternative placement of a child outside the parents' home. *Sumey*, 94 Wn.2d at 758-59. Under former RCW 13.30.020, *repealed by* LAWS OF 1979, ch. 155, § 86, a child could be placed into limited custody where the child had been reported as a runaway or when a law enforcement officer believed the child was in circumstances which constituted imminent and substantial danger to the child's physical safety. The state could then, at the request of the child or the parents, place the child in a temporary[3] alternative residential placement if the court found by a preponderance of the evidence that the petition was not capricious and that there was "a conflict between the parent and child that cannot be remedied by counseling, crisis intervention, or continued placement in the parental home." *Id.* at 764 (quoting former RCW 13.32.040, *repealed by* LAWS OF 1979, ch.155, § 86).

In *Sumey*, we concluded that the state properly acted pursuant to its parens patriae power finding that former RCW 13.32 was enacted to "safeguard the mental and emotional health of the child by removing him or her from

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2. Provisions in former RCW 13.32 have been supplanted by provisions in RCW 13.32A.

3. The residential placement was temporary. A review hearing had to be held every six months to approve or disapprove of the continuation of the placement. RCW 13.32.050, *repealed by* LAWS OF 1979, ch. 155, § 86. Throughout the six month period appropriate interim services were provided to the child and parents with the ultimate goal of reunification. *Id.*

a situation of family conflict that is so extreme that the parents and child are unable to live together even with the aid of counseling." *Id.* at 764. Additionally, the court emphasized that the statute also protected the "physical health of children like [Sumey] . . . who [were] driven by the family conflict to run away from home and expose themselves to the physical dangers that attend running away." *Id.* at 764-65.[4]

In contrast, this case presents no such compelling interest of the state. The statutes at issue do not contemplate any similar harm or potential harm to the child which must be prevented by third party visitation rights. Accordingly, the parens patriae authority does not justify the interference with parental rights permitted by these statutes.

One court aptly emphasized that "[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process." *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993).

> For the state to delegate to the parents the authority to raise the child as the parents see fit,

4. We note that the court in *Sumey* did not engage in a strict scrutiny analysis although it recognized that a parent's fundamental right to the "care, custody, and companionship" was at stake. *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). The court instead, without citation to authority, engaged in a balancing analysis weighing the interests of the parents against the parens patriae power of the state. *Id.* at 763. Nevertheless, the court's result was correct because the interests of the state in that case, as discussed above, were compelling and the statute was narrowly tailored to serve the state's interest.

> except when the state thinks another choice would be better, is to give the parents no authority at all. 'You may do whatever you choose, so long as it is what I would choose also' does not constitute a delegation of authority.

Id. (quoting Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393, 441 (1985-86)).

We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child. The difficulty, however, is that such a standard is not required in RCW 26.10.160(3) or in former RCW 26.09.240. Both statutes allow "any person" to petition for forced visitation of a child at "any time" with the only requirement being that the visitation serve the best interest of the child. There is no threshold requirement of a finding of harm to the child as a result of the discontinuation of visitation.

Short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. State intervention to better a child's quality of life through third party visitation is not justified where the child's circumstances are otherwise satisfactory. To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the "best family." It is not within the province of the state

to make significant decisions concerning the custody of children merely because it could make a "better" decision.

Additionally, the statutes lack other safeguards to prevent stable families from defending in court against frivolous petitions for visitation. Most notably the statutes do not require the petitioner to establish that he or she has a substantial relationship with the child. It seems that at a minimum such a showing should be required because harm to a child cannot reasonably be anticipated as a result of no contact with someone with whom the child has had no such relationship. Also, the statutes do not require the court to take into consideration such factors as the parents' reasons for restricting visitation with the petitioner or any allegations of past physical or mental abuse by petitioner when making a visitation determination.

Parents have a right to limit visitation of their children with third persons. The law's concept of the family rests "on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment . . . ." *Brooks v. Parkerson*, 265 Ga. 189, 192, 454 S.E.2d 769 (1995). Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas. *See* Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393

(1985-86). RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the "care, custody and companionship of the child." *Sumey*, 94 Wn.2d at 762.

ATTORNEYS FEES

Both RCW 26.09.140 and RCW 26.10.080 allow either party, based on financial need to recover attorneys' fees and costs from another party as a result of maintaining or defending any proceeding under either chapter upon a showing of financial need. Additionally upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. RCW 26.09.140; RCW 26.10.080. In deciding whether to award fees and costs, the court must balance the needs of the party requesting fees against the other parties' ability to pay. *In re Marriage of Harrington*, 85 Wn. App. 613, 935 P.2d 1357 (1997).

In *In re Custody of Smith*, the trial court declined to award either party costs or reasonable attorneys fees pursuant to RCW 26.09.140 and RCW 26.10.080. On appeal, Kelly Stillwell asserts the trial court erred its decision denying attorneys fees and costs. She also asks for attorneys fees and costs incurred on appeal.[5] Ms.

5. Ms. Stillwell asks for attorneys fees and costs on appeal pursuant to RCW 26.09.240(3). Ms. Stillwell cannot receive attorneys fees pursuant to RCW 26.09.240(3) as it was not in effect at the time the petition for custody was filed and there is not indication that the Legislature intended the amended provisions of the statute to be applied retroactively.

Stillwell, however, has not shown that the trial court abused its discretion in its determination. *See In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994) (the party challenging the award bears the burden of proving that the trial court exercised this discretion in a way that was clearly untenable or manifestly unreasonable). Pursuant to RAP 18.1(c) Ms. Stillwell has filed an affidavit of financial need to this court in support of her request for an award of fees and costs on appeal.

Likewise, neither the Troxels nor Ms. Granville were awarded fees or costs below. Ms. Granville asks this court pursuant to RCW 26.09.140 and RCW 26.10.080 to award her attorneys fees and costs on appeal. She has filed an affidavit reflected her financial need as required by RAP 18.1(c).

Finally, Ms. Wolcott was awarded attorneys fees by both the trial court and on appeal pursuant to RCW 26.10.080. Clay asks this Court to review the award of the fees below. Like the Court of Appeals, we find no abuse of discretion in the trial court's award. Ms. Granville asks for an award of fees and costs on appeal to this court and has filed the necessary financial affidavits.

We remand to the trial courts to determine whether these parties have established sufficient financial need to warrant an award of attorneys fees and costs on appeal, the financial ability of the parties to pay, and if an award is warranted the proper amount.

DOLLIVER, SMITH, JOHNSON, and SANDERS, JJ., concur.

TALMADGE, J. (concurring/dissenting) — While I agree with the majority's holding that the plain language of RCW 26.10.160(3) and former RCW 26.09.240 provides the petitioners standing to seek visitation with the respective children in these consolidated cases, I disagree with the majority's view that such visitation intrudes unconstitutionally into the realm of parents' protected interests. By eliminating the limited right these statutes provides for nonparents to seek visitation with children, the majority opinion will have cruel and far-reaching effects on loving relatives, particularly grandparents of children like the Troxels here, depriving them in many instances of any contact with their grandchildren. For these reasons, I respectfully dissent.

The majority correctly determines the plain language of RCW 26.10.160(3) compels the conclusion that the petitioners in these cases had standing. But the majority holds RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the "care, custody and companionship of the child." Majority op. at 21 (quoting *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). This holding is based on two flawed premises: First, a parent's fundamental right to autonomy in child-rearing decisions is unassailable, and, second, the State's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness. Majority op. at 13-17.

A. Parental Rights Are Not Absolute

As the majority notes, parental rights regarding the care and custody of their children are well established. *See*

Majority op. at 13-14. It is equally true, however, such rights are not absolute. As the majority asserts, the Supreme Court in *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), indeed noted "custody, care and nurture of the child reside first in the parents[,]" but went on to hold:

> [b]ut the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction.

Prince, 321 U.S. at 166-67 (citations omitted). The majority focuses on only a portion of the equation. The constitutional issue in these consolidated cases concerns the parameters and balancing of rights and interests of the State and child, as well as those of the parents.

We have previously addressed the parameters of the rights of parents and the State's parens patriae power to act in the child's best interests in *Sumey*, 94 Wn.2d 757. There, we balanced the rights of the parents, child and State, broadly interpreting the State's parens patriae right to intervene and protect a child as a valid justification for temporary residential placement of the child under RCW 13.32, stating:

The liberty and privacy protections of the due process clause of the Fourteenth Amendment establish a parental constitutional right to the care, custody, and companionship of the child. This constitutionally protected interest of parents has been described as a "sacred right" which is " 'more precious . . . than the right of life itself.' "

The parents' constitutional rights, however, do not afford an absolute protection against State interference with the family relationship. Although "[h]istorically, the natural parent's right to custody of a child . . . [was considered to be] absolute, barring a showing of unfitness . . . [g]rowing concern for the welfare of the child and the disappearance of the concept of the child as property has led to a gradual modification in judicial attitude." It is now well established that when parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a parens patriae right *and responsibility* to intervene to protect the child. As we observed in *State v. Koome*, 84 Wn.2d 901, 907, 530 P.2d 260 (1975),

> Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference . . . they are not absolute and must yield to fundamental rights of the child or important interests of the State.

> *Thus, in assessing the constitutionality of a procedure which infringes upon parents' rights to the care, custody, and companionship of their children, it is necessary to ascertain the proper balance between the parents' constitutional rights and the State's constitutionally protected parens patriae interest in protecting the best interests of the child.*

Sumey, 94 Wn.2d at 762-63 (most citations omitted) (emphasis added) (alterations in original). *Accord*, *Washington State Coalition for the Homeless v. Department of Soc. & Health Servs.*, 133 Wn.2d 894, 923, 929-30, 949 P.2d 1291 (1997).

Key to the balancing test we applied in *Sumey* was the degree of abridgment of parental rights which residential placement of the child entailed. We contrasted the temporary residential placement at issue with termination of parental rights and dependency proceedings. In so doing, we observed the requisite balancing called for appropriate justification for the severity of the abridgment of parental rights sought by the State. The termination of parental rights is an extreme abridgment of a parent's constitutional rights to care, custody and companionship of a child which requires the commensurately grave circumstance of harm (physical, mental or emotional) to the child resulting from the parent's conduct. But we contrasted this extreme abridgement with residential placement, explaining:

> [temporary] residential placement . . . does not infringe upon parental rights as severely as does

> a dependency adjudication or termination of parental rights . . . . An adjudication of dependency (on grounds such as parental abuse, neglect, or abandonment) can result in placement of the child in a foster home and transfer of certain legal rights and duties to the foster parents . . ., and can ultimately result in full termination of parental rights if the parents do not correct the behavior which led to the finding of dependency. In contrast, a [temporary] residential placement . . . does not result in the transfer of any legal rights and duties to the custodians of the child and such a placement cannot serve as a basis for a subsequent termination of parental rights.

Sumey, 94 Wn.2d at 763 (citations omitted). In *Sumey*, we upheld the placement of the child outside the home against the parent's wishes because:

> The degree of intrusion upon the parents' rights is relatively minor in that the parents retain custody over the child, the placement outside the home is designed to be temporary and to end as soon as the family conflict has been resolved . . . On balance, the substantial interests of the State and child are sufficient to justify the limited infringement upon the parents' rights.

Id. at 765. Similarly, where visitation is awarded to nonparents in furtherance of the best interests of the child under the visitation statutes at issue here, the parents retain

custody over the child. The allowance of visitation is even less intrusive than out of home residential placement of a child. Thus, our rationale in *Sumey* suggests where visitation is awarded under the statutes in question, the minor infringement on parental rights resulting from such visitation is permissible.

Furthermore, the United States Supreme Court cases striking down state action upon which the majority relies do not argue to the contrary. They involve substantial infringements of parents' (or others') rights. See Majority op. at 17-18, relying on *Wisconsin v. Yoder*, 406 U.S. 205, 219, 92 S. Ct. 1526, 1535, 37 L. Ed. 2d 15 (1972) (grave endangerment or destruction of free exercise of parents' religious beliefs); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534, 45 S. Ct. 571, 573, 69 L. Ed. 1070, 39 A.L.R. 468 (1925) (unreasonable interference with liberty of parents to direct the upbringing and education of their children where parents wanted to send their children to established religious or military schools); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 (1923) (a prohibition on teaching foreign languages in any school to children who had not yet completed eighth grade); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (presumptive termination of unwed father's parental rights). *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (termination of parental rights based on insufficient evidentiary standard). Such is not the case here.

Instructive is the response of the Indiana Appellate Court, addressing the same argument the majority makes

here, based on many of the same cases upon which the majority relies. Upholding its Grandparent Visitation Act, the court in *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. Ct. App.), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997), opined:

> Unlike these significant infringements, visitation rights by grandparents as defined by the Act are less than a substantial encroachment on the parent's fundamental rights or the autonomy of the nuclear family. The Act contemplates occasional, temporary visitation, which may only be allowed if a trial court finds visitation to be "in the best interests of the child." . . . the Act does not presume that grandparent visitation is necessarily in the children's best interest. Instead, the burden is on the grandparent, as the petitioning party, to demonstrate . . . that court-ordered visitation is in the children's best interest. If such a showing is made, it falls to the court to evaluate the evidence, assess the circumstances, and carefully devise a visitation schedule that is in the children's best interest.
>
> As such, permitting grandparent visitation over the adoptive parents' objection does not unconstitutionally impinge upon the integrity of the adoptive family.

Sightes, 684 N.E.2d at 230 (citations omitted). The same is true of the visitation statutes in question here. The minor encroachment of parental rights possible under these statutes is permissible under *Sumey*.

B. Parens Patriae

The majority's insistence that a showing of harm to the child or parental unfitness is required before the State's parens patriae power may be brought to bear is incorrect. In *Sumey*, there was no assertion of parental unfitness or harm to the child, yet we upheld the temporary residential placement of a child outside the home as a valid exercise of the State's parens patriae power to act in the child's best interests. *See Sumey*, 94 Wn.2d at 762-65. *See also State v. Steinbach*, 101 Wn.2d 460, 679 P.2d 369 (1984), in which Justice Dolliver, dissenting on a different issue, explained our holding in *Sumey* as follows:

> *Sumey* involved the question of whether the residential placement procedures of former RCW 13.32 violate due process by authorizing placement of a minor *without a prior finding of parental unfitness*. In that case, the child had petitioned the court and been granted an ARP [alternative residential placement]. Her parents challenged the constitutionality of the statute. As the majority points out, the case discusses the importance of the parent-child relationship. *The holding, however, is that the "limited infringement upon parental rights" by the ARP does not violate due process.*

Steinbach, 101 Wn.2d at 464-65 (Dolliver, J., dissenting) (emphasis added). Indeed, the provisions of RCW 13.32 may be invoked where a parent and child are in fundamental conflict, without any showing of parental unfitness. The majority's analysis calls such statutes into question.

Similarly, in *In re Welfare of Key*, 119 Wn.2d 600, 836 P.2d 200, *cert. denied*, 507 U.S. 927, 113 S. Ct. 1302, 122 L. Ed. 2d 691 (1993), in the context of a dependency hearing, we rejected the natural parent's assertion that, absent a finding of parental unfitness, the court's finding that the handicapped daughter is dependent violated the mother's due process rights. Applying the *Sumey* balancing test, we held a finding of unfitness was not required in a dependency proceeding, noting:

> Ms. Key's interest is the same as that of any parent in a dependency proceeding. Her interest does not depend on whether she is found unfit. Instead, *the presence or absence of unfitness would seem to affect only the weight of the State's interest.*

Key, 119 Wn.2d at 611 (emphasis added). Thus, even in a dependency proceeding, again a more severe abridgment of parental rights than that possible under the visitation statutes at issue here, unfitness is not a threshold trigger for exercise of the State's parens patriae power. Both parental unfitness and harm to the child speak rather to the allowable degree of abridgment of parental rights which the state may impose in exercising its parens patriae power.[6]

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6. Thus the majority's reliance on *Sumey* in asserting "[t]his court has emphasized that a state can *only* intrude upon a family's integrity pursuant to its parens patriae right when 'parental actions or decisions seriously conflict with the physical or mental health of the child[,]' " Majority op. at 18 (emphasis added), is misplaced. Indeed, recognizing that the State has not merely a right, but the

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Likewise, even in custody cases, the best interests of the child govern and unfitness is not a prerequisite for the state to exercise its parens patriae power to act on behalf of the child's welfare. In *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981), a dissolution custody case in which the Court of Appeals affirmed the trial court's award of custody to the step mother of a 7-year-old deaf son born of the father's prior marriage based on the stepmother's extraordinary measures to aid the child, the Court of Appeals held a custody proceeding required a middle ground.

> [T]o give *custody* to a nonparent there must be more than the "best interests of the child" involved, but less than a showing of unfitness. In extraordinary circumstances, where placing the child with an otherwise fit parent would be detrimental to the child, the parent's right to custody is outweighed by the state's interest in the child's welfare. There must be a showing of actual detriment to the child, something greater than the comparative and balancing analyses of the "best interests of the child" test. *Precisely what might outweigh parental rights must be determined on a case-by-case basis. But unfitness of the parent need not be shown.*

Allen, 28 Wn. App. at 649 (emphasis added). Thus, even in a *custody* proceeding unfitness of a parent need not

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(Cont'd)
responsibility to intervene when the severe circumstance of harm to the child is present is the starting point of *Sumey*'s parens patriae analysis. It does not end there however, as the above discussion explains. *See Sumey*, 94 Wn.2d at 762-65.

necessarily be shown. Each case is unique, save for the overarching principle that the welfare of the child is the paramount concern.

The majority's position that, absent a threshold finding of parental unfitness or harm to the child, no intrusion on parental rights, no matter how slight, may be undertaken by the State as parens patriae acting on the child's behalf, cannot be reconciled with the above case law.

The majority also goes too far in claiming "the Supreme Court cases which support the constitutional right to rear one's child and the right to family privacy indicate that the state may interfere *only* 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burden.' *Yoder*, 406 U.S. at 234." Majority op. at 17 (emphasis added). The cited case does not so hold. In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), the Supreme Court held the Free Exercise Clause of the First Amendment barred the application of compulsory school attendance law to Old Order Amish who did not send their children to school after the eighth grade because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215, 92 S. Ct. at 1533. *Yoder* turns on the free exercise claim asserted by the Amish parents and the unique facts of that case. The Supreme Court held where the interests of parents was *combined with a free exercise claim* of the nature present in that case, the state must show a compelling interest in requiring Amish parents to send their children to school beyond the eighth grade

contrary to their religious beliefs. Referencing *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), however, the Court went on to note that even where such greater justification for state action is required in light of the Amish parent's free exercise claim, parental action threatening harm to the child would not be tolerated.

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Yoder, 406 U.S. at 233-34. Thus, the Supreme Court in *Yoder* did *not* hold that harm is a threshold requirement for any encroachment upon parental rights, as the majority implies; but rather notes even where the circumstances of a particular case provide heightened protections for parental rights, the extreme circumstance of harm to the child clearly justifies state intervention. *Accord Prince*, 321 U.S. 158.

Likewise, the majority errs in concluding "[i]t is clear from Supreme Court precedent that some harm threatens the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child[,]" citing *Prince*, 321 U.S. at 170. Majority op. at 18. In *Prince*, the Supreme Court upheld, against assertions of free exercise and parental control, application of Massachusetts' child labor law prohibiting girls under 18 from selling publications (here religious literature) on the streets, finding the state's power to protect the child from harm was not

diminished by the presence or direction of the child's guardian. The exact parameters of the state's power to intrude into parental rights/free exercise were not discussed.[7] Regarding the limits of state power, the Court held only "the rightful boundary of [the state's] power has not been crossed in this case" and noting "[o]ur ruling does not extend beyond the facts the case presents." *Prince*, 321 U.S. at 170-71. Although *Prince* indicates state intervention in areas of religious practices or parental control is appropriate to prevent harm to a child, that case does not suggest harm to a child is a threshold requirement for any and all types of state encroachment of parental rights.

C. Grandparent Visitation Cases

Cases concerning the constitutionality of grandparent visitation statutes are also instructive as they address the constitutional legitimacy of intrusions into parental rights. The majority mentions only two such cases, *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993), and *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, *cert. denied*, 516 U.S. 942, 116 S. Ct. 377, 133 L. Ed. 2d 301 (1995). *See* Majority op. at 19-21. *Hawk* was decided on state constitutional grounds. *Hawk*, 855 S.W.2d at 582. *See also Beagle v. Beagle*, 678 So.2d 1271, 1275-76 (Fla. 1996) (holding Florida's grandparent visitation statute violative of the enhanced

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7. After noting the "custody, care and nurture of the child reside first in the parents," the Court went on to hold "neither rights of religion nor rights of parenthood are beyond limitation . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[.]" *Prince*, 321 U.S. at 161-67 (citations omitted).

privacy rights found in art. 1, § 23 of the Florida Constitution, which provides privacy protections "broader in scope" than the federal constitution). Given the state constitutional bases of the *Hawk* and *Beagle* holdings, they are of little precedential or persuasive value here since the Washington Constitution (art. 1, § 7) affords no greater protection than the minimum protection conveyed by the federal constitution on matters other than search and seizure. *See Ramm v. City of Seattle*, 66 Wn. App. 15, 27, 830 P.2d 395 (1992). *Brooks* adopted the reasoning of *Hawk* but declared Georgia's grandparent visitation statute violative of both the state and federal constitutions. The *Brooks* majority, relying on termination cases, premised its holding on the notion that the extent of the intrusion upon parental rights to custody and control was irrelevant. *No* infringement of such rights, regardless of how small, was permissible absent a showing of harm to the child. *Brooks*, 265 Ga. at 194 n.6. We rejected such approach in *Sumey*. Indeed, our pronouncements on parens patriae in *Sumey* are more in harmony with the *Brooks* dissent which chided the majority there for its restrictive view, opining:

> Following Tennessee's lead, the majority maintains that the State's authority to assert itself as parens patriae "is permissible only where the health or welfare of a child is threatened." Majority, p. 193. However, in Georgia, the courts have acted as parens patraie when considering such nonthreatening items as a child's name change, and a purported father's petition of legitimation. In Georgia, the exercise of the parens patriae power has always had as its

> paramount consideration the best interests of the child, and its exercise has become synonymous with the child's best interests and welfare.

Brooks, 265 Ga. at 199-200 (Benham, Presiding J., dissenting).

The majority cites only the minority view and fails to mention cases such as *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992), upholding Kentucky's grandparent visitation statute against a federal constitutional challenge. *See also Hawk*, 855 S.W.2d at 577 n.1 ("[t]he United States Supreme Court was asked to review the *King* case on a right-to-privacy theory and declined. The Supreme Court has never entertained a case involving the right to visitation of grandparents or other third parties." (Citation omitted)). In fact, the majority of cases in the United States have upheld grandparent visitation statutes. In upholding the constitutionality of Utah's Grandparent Visitation Statute, the Utah Court of Appeals noted:

> the vast majority of courts that have addressed the constitutionality of grandparent visitation statutes authorizing visitation if in the best interest of the child, have upheld those statutes as constitutional. *See Sketo v. Brown*, 559 So.2d 381, 382 (Fla.App.1990); *Bailey v. Menzie*, 542 N.E.2d 1015, 1020 (Ind.App.1989); *Spradling v. Harris*, 13 Kan.App.2d 595, 778 P.2d 365, 368 (1989); *King v. King*, 828 S.W.2d 630, 631-32 (Ky.), *cert. denied*, [506 U.S. 941], 113 S.Ct.

378, 121 L.Ed.2d 289 (1992); *Herndon v. Tuhey*, 857 S.W.2d 203, 208 (Mo. 1993) (en banc); *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478, 481 (1985); *People ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 445 N.Y.S.2d 420, 423, 429 N.E.2d 1049, 1052 (1981); *Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex.App.1975). While the Tennessee Supreme Court has held that Tennessee's grandparent visitation statute is unconstitutional under the Tennessee Constitution, the court did not decide whether the statute is unconstitutional under the United States Constitution. *See Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993). To date, only Georgia has declared a statute permitting court-ordered grandparent visitation, if in the best interest of the child, to be unconstitutional under the United States Constitution. *See Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, 773-74 (1995).

Campbell v. Campbell, 896 P.2d 635, 644 n.18 (Utah App. 1995).

As with RCW 26.10.160(3) and former RCW 26.09.240, the Kentucky statute at issue in *King* allowed visitation by nonparents (i.e., grandparents) if in the best interest of the child. *Cf.* KY. REV. STAT. ANN. § 405.021, RCW 26.10.160(3) and former RCW 26.09.240. The denial of certiorari by the Supreme Court suggests the Kentucky Supreme Court correctly determined the application of the similar Kentucky statute did not go too far in intruding into

the fundamental rights of parents under the federal constitution. As the Washington Constitution affords no greater protection than the federal constitution in this area, *see Ramm v. City of Seattle*, 66 Wn. App. 15, 27, 830 P.2d 395, *review denied*, 120 Wn.2d 1018, 844 P.2d 437 (1992), Washington's similar provisions likewise withstand a constitutional challenge.[8] *See also Sightes v. Barker*, 684

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8. The majority has correctly refrained from an analysis based on state constitutional grounds as urged by appellant Stillwell who asserted "[a]rticle 1, § 7 of the Washington Constitution mandates greater protection of the 'private affairs' of the family under the six . . . factors . . . in *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986)[,]" Br. of Appellant at 14-18. This argument was rejected in *Ramm v. City of Seattle*, 66 Wn. App. 15, 23-27, 830 P.2d 395, *review denied*, 120 Wn.2d 1018, 844 P.2d 437 (1992), wherein the Court of Appeals held:

> Our examination of the six *Gunwall* factors persuades us that, *on matters not involving search and seizure*, Const. art. 1, § 7 affords no greater protection than the minimum protection afforded by the federal constitutional analysis.

Ramm, 66 Wn. App. at 27 (emphasis added). Stillwell cites *In re Detention of D.A.H.*, 84 Wn. App. 102, 110, 924 P.2d 49 (1996), for the proposition that our state constitution provides greater privacy protection than the expectations created by the Fourth Amendment. Reply Br. of Appellant at 9. *D.A.H.* relies, however, on a search and seizure case, *State v. Boland*, 115 Wn.2d 571, 577-78, 800 P.2d 1112 (1990), for that statement and failed to recognize the distinction between autonomy and search and seizure cases as *Ramm* does. *See Ramm*, 66 Wn. App. at 23-27, discussing *Boland*.

(Cont'd)

N.E.2d 224 (Ind. App.) (upholding Indiana's Grandparent Visitation Act against a federal constitutional challenge as a less than substantial encroachment on the parent's rights and a legitimate exercise of the state's parens patriae power where such visitation serves the child's best interests), *transfer denied*, 690 N.E.2d 1187 (Ind. 1997).

Even in the absence of specific statutory authority a court may exercise its parens patriae power to act in the child's best interests regarding visitation matters, as the New Hampshire supreme court in *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478 (1985). Recognizing the changing circumstances of modern families, the *Roberts* court awarded visitation rights to grandparents, over objections of the natural parent, based on the court's equitable powers. While noting the importance of parental rights the court opined:

> Parental autonomy is grounded in the assumption that natural parents raise their own

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(Cont'd)

Stillwell also misstates *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996); which found the Florida grandparent visitation statute violative of the state constitution, asserting the case to note "Washington's Constitution provides express privacy protections similar to those relied upon by the Florida Supreme Court. 678 So. 2d at 1275 n.9." Br of Appellant at 18. However, in *Beagle*, the Florida court actually notes the Florida Constitution provides greater privacy protection than the federal constitution and lists Washington among states which include privacy protections in their *search and seizure* constitutional provisions. *See Beagle*, 678 So. 2d at 1275 & n.9. This interpretation comports with the *Ramm* holding (cited above) noting heightened protection regarding searches and seizures only.

children in nuclear families, consisting of a married couple and their children. The family has been seen as the "basic building block" of society. Parental autonomy strengthens the family and the entire social fabric "by encouraging parents to raise their children in the best way they can by making them secure in the knowledge that neither the state nor outside individuals may ordinarily intervene."

The realities of modern living, however, demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded .... More varied and complicated family situations arise as divorces, and decisions not to marry, result in single-parent families; as remarriages create step-families; as some parents abandon their children; as others give them to temporary caretakers; and as still others are judged unfit to raise their own children.

One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal attachments between them and adults outside of their immediate families. Stepparents, foster parents, grandparents and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact.

> It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family.

Roberts, 126 N.H. at 391-92 (citations omitted). Emphasizing the best interests of the child to be of paramount concern the *Roberts* court held exercise of the parens patriae power to act in the child's welfare was appropriate here:

> . . . the better view is that the superior court, as an instrumentality of the State, may use its *parens patriae* power to decide whether the welfare of the child warrants court-ordered visitation with grandparents to whom close personal attachments have been made.
>
> . . . .
>
> In determining whether or not to grant grandparental visitation, the court must consider the best interests of the child. In doing so, it recognizes that it is primarily "the right of the child to . . . know her grandparents" which is being protected and not the interests of the grandparents.
>
> Moreover, in balancing the child's rights to know and associate with her grandparents against

> the parent's right to custodial autonomy, we note that we are dealing here only with visitation rights. "[G]ranting visitation is a far lesser intrusion, or assertion of control, than is an award of custody" and thus not nearly as invasive of parents' rights.
>
> Our holding today is in accord with the position taken by a number of other jurisdictions, which have found non-statutory bases for granting grandparents visitation rights.

Roberts, 126 N.H. at 392-93 (citations omitted).

D. Sufficiency of the "Best Interest" Standard

Although the majority recognizes that the severing of a meaningful relationship a child enjoys with a nonparent may be harmful to the child,[9] its disposition of this case undermines the opportunity to sustain such relationships. This need not be the case. The faults the majority sees in RCW 26.10.160(3) and former RCW 26.09.240 are more imagined than real. Both RCW 26.10.160(3) and former 26.09.240 provide that the trial court may order visitation rights for a nonparent "when visitation may serve the best interest of the child[,]" but the majority finds this standard insufficient, and faults the statutes for lacking enumerated factors such as a substantial relationship between petitioner

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9. "We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child." Majority op. at 20.

and child or consideration of any past abuse of the child by the petitioner. Majority op. at 19-21. However, such factors/considerations are clearly subsumed under the "best interests of the child" determination[10] which is unique in each case.

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10. Although it appears the majority would be more comfortable with an enumeration of "best interest" factors such as those appearing in the current version of RCW 26.09.240(6), even that statute makes clear that such enumeration is illustrative only. *See* RCW 26.09.240(6) ("The court *may* consider the following factors when making a determination of the child's best interests:") (emphasis added) and 240(6)(h) ("Any other factor relevant to the child's best interest."). RCW 26.09.240(6) states in full:

> (6) The court may consider the following factors when making a determination of the child's best interests:
>
> (a) The strength of the relationship between the child and the petitioner;
>
> (b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;
>
> (c) The nature and reason for either parent's objection to granting the petitioner visitation;
>
> (d) The effect that granting visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
>
> (e) The residential time sharing arrangements between the parents;
>
> (f) The good faith of the petitioner;

(Cont'd)

See Washington State Coalition for the Homeless v. Department of Soc. & Health Servs., 133 Wn.2d 894, 931-32, 949 P.2d 1291 (1997) ("Ultimately what is in the best interests of a particular child depends on 'a highly fact-specific inquiry that cannot be reduced to a mathematical equation.' ").[11]

(Cont'd)

> (g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and
>
> (h) Any other factor relevant to the child's best interest.

11. Should a listing of "best interest" factors be necessary, as the majority insists, we are not without authority to provide them. Again, the New Hampshire supreme court's approach in *Roberts* is instructive. Like the majority here, the *Roberts* court recognized the importance of continuity and stability in children's close relationships, *Roberts*, 126 N.H. at 392-93, and, relying on its equity powers, established six factors to be considered when acting in the child's best interests when considering a petition for visitation by grandparents.

> Factors which the court may consider in determining whether or not to grant grandparental visitation include: [1] whether the child has lived with the grandparents and the length of that residence; [2] whether the grandparents have stood *in loco parentis* to the child; [3] the effect on the child's physical and emotional health engendered by visitation or lack of it; [4] the circumstances which resulted in the absence of a nuclear family; and [5] the child's preference regarding visitation . . . . [6] The fact that there is

(Cont'd)

(Cont'd)

> friction between the parents and grandparents will not in and of itself preclude granting visitation rights but may be considered among all the surrounding circumstances.

Roberts, 126 N.H. at 394 (citations omitted). Substituting "petitioner" for "grandparents" in the above criteria would provide the factors the majority seeks, and like the New Hampshire supreme court, we may provide trial courts with guiding considerations in matters concerning a child's well-being. *See In re Dependency of J.B.S.*, 123 Wn.2d 1, 11, 863 P.2d 1344 (1993) (holding the best interests of the child prevail when the rights of parent and child conflict, and providing guiding considerations for the trial court in the event of a future motion for change of placement). Any such enumeration of factors, however, would be illustrative only, and subsumed under the "best interest" standard in any event. Such listing is therefore unnecessary. Under the umbrella of the best interest standard a trial court considers the unique circumstances of each case when deciding issues affecting a child's welfare. As we stated in the dependency case of *In re Welfare of Becker*, 87 Wn.2d 470, 477-78, 553 P.2d 1339 (1976):

> While our statutes and judicial opinions may set forth the goal, the criteria for establishing the best interests for the welfare of the child are conspicuous by their absence. The complexity of the cases and the need for careful individual treatment militates against the mandatory consideration of certain specified factors in every case. Nevertheless, the courts have broad discretion and are allowed considerable flexibility to receive and evaluate all relevant evidence in reaching a decision that recognizes both the welfare of the child and parental rights.

(Citations omitted.)

We have long held that trial courts have broad discretion to determine the best interests of a child in cases touching upon a child's welfare, and such determinations are given great deference. In the context of a dependency proceeding, we stated in *Aschauer*:

> While the criteria for establishing the best interests of the child are not capable of specification, each case being largely dependent upon its own facts and circumstances, the proof necessary in order to deprive a person of his or her parental rights must be clear, cogent and convincing. If there is substantial evidence which the lower court could reasonably have found to be clear, cogent and convincing, an appellate court should not disturb the trial court's findings. Deference paid to the trial judge's advantage in having the witnesses before him is particularly important in deprivation proceedings, when it is borne in mind that continuity in the parent-child relationship, whether the parent figure be the natural parent or not, is increasingly recognized as a significant factor in a child's normal development.
>
> . . . Courts are always reluctant to deprive parents of rights with respect to their children, and it is particularly sad when the parent cares for the child and desires to be a good parent, as appears to be the case here. However, it is the court's duty to see that those rights yield, when to accord them dominance would be to ignore the needs of the child.

In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980) (citations omitted).

The best interests of the child remain the court's paramount concern. This inquiry is the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children. *See, e.g., Washington State Coalition for the Homeless v. Department of Soc. & Health Servs.*, 133 Wn.2d 894, 923, 949 P.2d 1291 (1997) ("As in all matters dealing with the welfare of children, the court must additionally act in the best interests of the child."); *Aschauer*, 93 Wn.2d at 695) ("This court has repeatedly said that the goal of a dependency hearing is to determine the welfare of the child and his best interests."); *In re Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973) ("a child's welfare is the court's primary consideration . . . when the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail"); *In re Marriage of Littlefield*, 133 Wn.2d 39, 51-52, 940 P.2d 1362 (1997) (noting in the absence of parental cooperation in a postseparation action, the trial court is given broad discretion to develop and order a parenting plan according to the guidelines set forth in RCW 26.09.187(3) and based upon the best interests of the children at the time of trial); *State ex rel. Campbell v. Cook*, 86 Wn. App. 761, 771, 938 P.2d 345, *review denied*, 133 Wn.2d 1019, 948 P.2d 387 (1997) (noting the best interests of the child are paramount in paternity proceedings, the Court of Appeals upheld trial court's denial of the putative father's attempt to reopen/ challenge paternity determination made 13 years prior).

While our case law supports use of the "best interest" standard in matters relating to the welfare of children, Judge

Ellington's dissent in *Troxel* deftly explains why this standard is particularly appropriate here:

> The statute itself contains the Legislature's standard for both threshold and standing, in its requirement that the visitation serve the best interests of the child.
>
> Many considerations could explain a legislative decision to leave RCW 26.10.160(3) unamended. Grandparent visitation issues come most readily to mind. For if a custody action must be pending before a grandparent may petition, then a grandparent whose child is dead — as is the Troxels' son — and who can thus never expect a RCW 26.09 petition opportunity (because no petition will ever be pending under that chapter) also has no recourse under RCW 26.10 *unless* willing to allege the remaining parent is unfit — hardly a prelude to amicable relations among family members. Is there never then to be a circumstance where a child indeed has a fit parent, but also has strong ties to grandparents, warm and beneficial ties which the child's best interests call for protecting?
>
> The limitations which public policy may place on such petitions are fertile grounds for debate . . . But these are matters for the Legislature, and for now, the current statute expresses one policy approach: any person may petition at any time, so long as the child's best

> interests are served. It cannot be said that this approach is absurd, or even out of harmony with RCW 26.09.240.

In re Visitation of Troxel, 87 Wn. App. 131, 142-43, 940 P.2d 698 (1997) (Ellington, J., dissenting) (italics and footnotes omitted). Indeed, the broad language of RCW 26.10.160(3) and former RCW 26.09.240 furthers the best interests of the child by tacitly recognizing the growth of nontraditional families and the important role members of such families may play in the child's life.

The best interest standard lacks nothing in its brevity and retains the necessary flexibility required by a trial court in addressing the infinite circumstances and possibilities which surround child welfare determinations such as the nonparent visitation at issue in these cases. We should reiterate the best interests of the child remain the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children.[12] In the

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12. *See Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996). While finding the Florida grandparent visitation statute violative of the state constitution, the Florida Supreme Court acknowledged other states had upheld their grandparent visitation statutes against federal constitutional challenges, noting: "[i]n those cases a best interest standard was deemed to be sufficient." *Id.* at 1275 (citing *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); *Lehrer v. Davis*, 214 Conn. 232, 571 A.2d 691 (1990); *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind. Ct. App. 1989); *Spradling v. Harris*, 13 Kan. App. 2d 595, 778 P.2d 365 (1989); *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992); *Ridenour v. Ridenour*, 120 N.M. 352, 901 P.2d 770 (Ct. App.), *cert. denied*, 120 N.M. 68, 898 P.2d 120 (1995)).

consolidated cases before us, the trial courts in *Troxel* and *Smith* entered specific findings that visitation with the petitioners would be in the respective children's best interest. *See Troxel* Findings of Fact 2.3E, Clerk's Papers at 128; and *Smith* Findings of Fact 2.17, Clerk's Papers at 6; Conclusions of Law 3.3, Clerk's Papers at 9. The majority ignores these findings.

E. Harassment Suits

The majority also faults the statutes in question for lacking safeguards to prevent stable families from defending in court against frivolous petitions for visitation. Majority op. at 20. This imagined threat is also unfounded. Courts are amply provided with the means of deterring such abuses. *See* CR 11 (authorizing sanctions, expenses and attorney fees for frivolous claims which may be imposed sua sponte by a trial court); *see also* RCW 26.10.080 and 26.09.140 (providing for costs and attorney fees at the court's discretion regarding "any proceeding under this chapter").

CONCLUSION

The majority correctly holds the nonparents in these consolidated cases have standing to petition for visitation under the plain language of RCW 26.10.160(3) and former RCW 26.09.240. The majority is incorrect, however, in holding that such visitation, when awarded upon determination of the best interests of the child, impermissibly infringe the rights of parents. Since we have previously approved an encroachment of parental rights of greater magnitude than that possible under the statutes in question, the majority's position is untenable.

In practical terms, the majority would deprive nonparties to custody proceedings in dissolutions from any opportunity to have visitation with a child even where the relationship with the child is significant and in the child's best interest. This is cruel both to the child who may want and need a relationship with grandparents, relatives, and others, and to those third parties, many of whom are the child's blood relatives. I decline to apply such an approach that is oblivious to the varied relationships that flourish in our society.

As the requisite finding of best interest of the child has been made in *Troxel* and *Smith*, the trial courts' orders granting visitation should be reinstated/affirmed. Because the trial court in *Wolcott* found petitioner Clay to have no standing under a theory we reject, and did not reach the issue of best interest of the child, that case should be remanded for further proceedings including a determination regarding the best interest of the child. I would reverse the Court of Appeals in *Wolcott* and remand for further proceedings, reverse the Court of Appeals in *Troxel* and reinstate the trial court's order, and affirm the trial court in *Smith*.

DURHAM, C.J., and GUY and ALEXANDER, JJ., concur with TALMADGE, J.

APPENDIX B — OPINION OF THE WASHINGTON COURT OF APPEALS DATED JULY 28, 1997 IN *IN RE VISITATION OF TROXEL*, 87 Wn. App. 131

[No. 36737-4-I. Division One. July 28, 1997.]

In the Matter of the Visitation of NATALIE ANNE TROXEL, ET AL., JENIFER TROXEL, ET AL., *Respondents*, and TOMMIE GRANVILLE, *Appellant*.

* * *

COX, J. — Tommie Granville, n/k/a Wynn, appeals the trial court's visitation award to Jenifer and Gary Troxel, the paternal grandparents of her daughters Natalie and Isabelle. Wynn argues that the grandparents lack standing to petition for two reasons. First, there was no pending custody proceeding at the time of the grandparents' petition. Second, her husband Kelly Wynn adopted both girls.

Wynn also challenges evidentiary rulings by the trial court, contends it applied the wrong standard in making its decision, and maintains the findings and conclusions are inadequate. Moreover, she challenges the constitutionality of the visitation statute. Because the Troxels had no standing to petition for visitation in the absence of a pending custody proceeding, we reverse.

Brad Troxel and Tommie Wynn had a relationship that ended in June 1991. Natalie and Isabelle are their daughters and the granddaughters of Jenifer and Gary Troxel. After the separation, Brad lived with the Troxels and regularly brought Natalie and Isabelle to the Troxels' house for weekend visitation. Brad committed suicide in May 1993.

Appendix B

After Brad's death, the Troxels saw Natalie and Isabelle regularly, though the girls did not stay overnight at the Troxel residence. In October 1993, Wynn informed the Troxels that she wished to limit visitation to one short visit per month. The Troxels declined Wynn's offer. Between October and December 1993, they did not see Natalie and Isabelle. They did not resume regular visitation with the girls until April 1994, when a court commissioner entered a temporary visitation order.

In December 1993, Jenifer and Gary Troxel commenced this action, seeking court-ordered visitation with their granddaughters. At the time of trial in December 1994, Natalie and Isabelle were five and almost three years old, respectively.

At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation during the summer. Based on the recommendation of her counselor, Dr. Nora Young, Wynn asked the court to order one day of visitation each month with no overnight stay. Dr. Young also suggested that the grandparents participate in the Wynns' holiday celebrations. The court heard testimony from the Troxels, their son-in-law, and two expert witnesses that Wynn hired. Based on the evidence, the trial court issued its oral ruling and entered a visitation decree ordering visitation of one weekend per month, one week in the summer, and four hours on the birthday of each of the Troxels.

Wynn sought review. We remanded the case for entry of findings of fact and conclusions of law. We later directed the parties to file additional briefs.

Appendix B

Standing

Wynn argues that the Troxels lack standing to petition for visitation. The Troxels counter that the plain meaning of RCW 26.10.160(3) allows them to so petition. We hold that the Troxels lack standing because no child custody proceeding was pending when the Troxels commenced this action.

At issue is the meaning of RCW 26.10.160(3). Statutory construction is a question of law that we review de novo.[1] The primary objective of statutory construction is to carry out the intent of the Legislature by examining the language of the statute.[2] We give words their plain meaning unless a contrary intent appears.[3] We also must construe statutes "as a whole in order to ascertain legislative purpose, and thus avoid unlikely, strained or absurd consequences which could result from a literal reading."[4]

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1. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993).

2. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 809, 756 P.2d 736 (1988).

3. *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986).

4. *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 321, 382 P.2d 639 (1963).

RCW 26.10.160(3) provides:

> *Any person* may petition the court for visitation rights *at any time* including, but not limited to, custody proceedings. The court may order visitation rights for *any person* when visitation may serve the best interest of the child whether or not there has been any change of circumstances.[5]

A literal reading of this statute could lead to the sort of absurd result that our canons of statutory construction forbid. Does "any person" have standing to petition "at any time" for visitation with a child? For example, could a member of the state Legislature who has displeased a constituent find herself faced with the considerable expenditure of time, money, and emotional energy to oppose a wholly frivolous petition by that constituent? Should this occur without any showing that the parent was unfit or that the family was unstable or that the child was otherwise facing any threat to its well-being? Our Legislature could not have intended such an absurd and potentially pernicious result from so broad a reading of the statute.

This court stated in dicta in *In re Custody of B.S.Z.-S.*[6] that the third-party visitation provision in RCW 26.10.160(3) applies only in the context of actions for child custody and questions of visitation that arise in custody

5. (Emphasis added.)

6. 74 Wn. App. 727, 731, 875 P.2d 693 (1994).

actions. RCW 26.10.030(1) provides that a petitioner may commence a third-party child custody proceeding only when a child is not in the custody of one of its parents or if the petition alleges parental unfitness. That limitation is consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the "care, custody, and management" of their children.[7] The Legislature could not have intended to open the door to "any" person petitioning for visitation "at any time," having created such strict standing requirements for third-party custody proceedings.

RCW 26.10 is entitled "Nonparental Actions for Child Custody." The Legislature's statement of intent declares that it enacted RCW 26.10 to "reenact and continue the law relating to third-party actions involving custody of minor children."[8] That statement of intent is also consistent with restricting petitions for visitation to custody proceedings, rather than allowing petitioners to commence new proceedings when no custody or other action is pending.

Our reading of the limitations of RCW 26.10.160(3) finds further support in the statutory history of this statute and RCW 26.09.240, a parallel provision. In 1987, the Legislature reenacted and continued the law relating to third party actions involving custody of minor children in order to distinguish it from the 1987 parenting act amendments. The 1987 version of RCW 26.09.240 provided, in part, that

7. *See Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

8. RCW 26.10.010.

"[a]ny person may petition the court for visitation rights at any time." Similarly, RCW 26.10.160, as originally enacted in 1987, provided, in part, that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings."

Aside from some renumbering,[9] the portion of RCW 26.10.160(3) that is relevant to this matter has remained unchanged since enactment. In 1989, the Legislature substituted "a person other than a parent" for "any person" in RCW 26.09.240,[10] but the relevant language remained otherwise unchanged until last year.

In its 1996 session, the Legislature amended RCW 26.09.240 to limit the circumstances under which a nonparent may petition for visitation rights. First, a "person other than a parent may not petition for visitation under this section unless the child's parent or parents have commenced an action under this chapter."[11] Second, even where such an action is pending, a court must dismiss a visitation petition unless the petitioner "can demonstrate by clear and convincing evidence that a significant relationship exists with the child with whom visitation is sought."[12] If the court dismisses the petition on that basis,

9. Laws of 1996, ch. 303, § 2, p. 1636; Laws of 1994, ch. 267, § 2, p. 1698; Laws of 1989, ch. 326, § 2, p. 1605.

10. Laws of 1989, ch. 375, § 13, p. 1969.

11. RCW 26.09.240(1).

12. RCW 26.09.240(3).

the petitioner must pay reasonable attorney fees and costs to the respondent.[13]

In 1987, the Legislature enacted virtually identical provisions that have subsequently proceeded on parallel tracks. We can see no plausible reason why the Legislature would amend RCW 26.09.240 and not RCW 26.10.160(3). Therefore, we must assume that the Legislature's failure to similarly amend the latter statute was the result of an unintentional oversight.

For all of the reasons discussed above, whether or not the Legislature overlooked amending RCW 26.10.160(3) when it amended RCW 26.09.240, we believe it did intend that a custody proceeding be in effect before third parties could petition for visitation.

Accordingly, we hold that a petition for visitation under RCW 26.10.160(3) must be contemporaneous with a proceeding for child custody.[14] There was no such proceeding when the Troxels filed their petition. The Troxels did not have standing to bring their petition for visitation.

The Troxels argue that they have standing under RCW 26.09.240(1) because of a proceeding in 1992 under the Uniform Parentage Act[15] that resulted in a parenting plan

13. RCW 26.09.240(3).

14. *In re Visitation of Wolcott*, 85 Wn. App. 468, 933 P.2d 1066 (1997).

15. RCW 26.26.

for these children. No such decree is in the record in this case. In any event, Division III of this court has properly rejected the contention that RCW 26.26.130(6) effectively invokes the dissolution statute: "[T]he reference to RCW 26.09 is merely the direction to apply the same procedures and criteria as those used in the Parenting Act of 1987, LAWS OF 1987, ch. 460, in formulating a paternity parenting plan."[16] The Troxels' argument is unpersuasive.

Wynn makes several other challenges to the visitation decree. She argues that her husband's adoption of both girls eliminates the Troxels' right to petition for visitation. She also claims that the trial court abused its discretion by failing to follow the recommendations of her expert witnesses. In addition, Wynn argues that the visitation statute impermissibly interferes with parents' constitutionally protected interest in child-rearing. She also claims that, in determining the best interests of the child in a nonparental visitation proceeding, a court's inquiry should be whether failure to order visitation would be detrimental to the child's development. Alternatively, she suggests that a court should apply the standards of the recently revised statute governing nonparental visitation in dissolution proceedings to the question of the child's best interests. Finally, she argues that, under either test, the findings of fact and conclusions of law in this case were inadequate to support the award. We do not reach these questions because of our disposition based on a lack of standing.

We reverse the visitation decree and dismiss the Troxels' petition for visitation.

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16. *In re Custody of Brown*, 77 Wn. App. 350, 355, 890 P.2d 1080 (1995).

GROSSE, J. (concurring) — I write separately to underscore the salient fact behind the majority opinion: The Legislature has rejected the approach advocated by the dissent,[17] and an appeal to the people by initiative failed to gain the requisite signatures.[18] So, while the legislative approach may lack logic and common sense, it is the approach chosen by the policy makers with plenary authority over this subject.

ELLINGTON, J. (dissenting) — I must respectfully disagree with the majority's construction of the statute involved here, and with its reliance on dicta in *In re Custody of B.S.Z-S.*, 74 Wn. App. 727, 875 P.2d 693 (1994). I therefore dissent.

Petitioners commenced this action under RCW 26.10.160(3), which grants to "any person" the opportunity to petition for visitation rights "at any time including, but not limited to, custody proceedings." This language is plain and unambiguous.

As the majority notes, from 1987 to 1996, RCW 26.10.160(3) had a close parallel in RCW 26.09.240, which read:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

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17. H.B. 1973, 55th Leg., Reg. Sess. (Wash. 1997).

18. Initiative 672 (initiative failed for lack of signatures).

> A person other than a parent may petition the court for visitation rights at any time.
>
> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

In 1996, RCW 26.09.240 was amended to provide, inter alia:

> A person other than a parent may petition the court for visitation with a child at any time or may intervene in a pending dissolution, legal separation, or modification of parenting plan proceeding. A person other than a parent may not petition for visitation *under this section* unless the child's parent or parents have commenced an action *under this chapter*.

RCW 26.09.240(1) (emphasis added).

The limiting language underscored above states a legislative intent to confine the new limitation, requirement of a pending action, to nonparent visitation petitions filed under RCW 26.09, entitled "Dissolution of Marriage — Legal Separation." It does not indicate any intent regarding nonparent visitation provisions in other chapters. RCW 26.10 is entitled "Nonparental Actions for Child Custody." Its visitation section quoted above was not amended.

The majority concludes the Legislature simply overlooked amending RCW 26.10.160(3) when it amended

RCW 26.09.240. While this certainly is a possibility, courts do not read statutes into or out of existence merely because of possible legislative oversight. The concern expressed by the majority is that a literal reading of RCW 26.10.160(3) could lead to absurd results because if "any person" could file a petition, frivolous petitions motivated by greed or hostility might result. I do not share this fear. I heard no reports of such petitions before the 1996 amendment, and trial courts are well-equipped to deal with frivolous petitions in any event.

The majority also relies on dicta from *In re Custody of B.S.Z-S.*, 74 Wn. App. at 731, stating that the third-party custody provision in RCW 26.10.160(3) applies only in the context of custody actions. I must respectfully disagree with that dicta. RCW 26.10.160(3) specifically states that a third-party visitation petition is available "at any time including, but not limited to, custody proceedings." The *B.S.Z-S.* reading of the statute is not supported by its plain language. It follows that I must respectfully disagree with the majority here, when it states, "The Legislature could not have intended to open the door to 'any' person petitioning for visitation 'at any time,' having created strict standing requirements for third-party custody proceedings." Majority at 135. This statement seems to me, with all due respect, entirely conclusory.

The imposition of strict requirements for third-party *custody* petitions does not lead inexorably to the conclusion that the same requirements were intended to apply to *visitation* petitions. On the contrary, custody and visitation are vastly different matters. A petition for custody amounts

to an attempt to wrest one's child permanently from one's care and control. A petition for visitation, on the other hand, is an attempt merely to gain a claim on some time with the child, and interferes distinctly less in the parents' autonomy. The Legislature can sensibly create different thresholds for these different proceedings.

Previously, this court attempted to construe the governing statute to include "change of circumstances" threshold requirements for third-party petitions. This construction was immediately rejected by the Legislature. In 1976, RCW 26.09.240 read essentially as does RCW 26.10.160(3) today. (Third-party actions were separated in 1987, when RCW 26.10 was passed.) In construing a visitation petition under then RCW 26.09.240, Division II of this court held that "in the absence of a threshold change of status affecting the family unit, RCW 26.09.240 does not authorize the court to grant visitation rights to a third person, including a child's maternal grandparent." *Carlson v. Carlson*, 16 Wn. App. 595, 597, 558 P.2d 836 (1976). The court's enumeration of changes in status which might justify such an order included death of one or both of the natural parents, dissolution or separation, child abuse or abandonment. The court stated:

> In the absence of a threshold situation so affecting the interests of the child with regard to the continuity of the family unit, the welfare of the child will seldom, if ever, be served by a judicially imposed overriding of parental discretion to determine whether a third person, distinct from the basic family unit, shall be

> permitted the privilege of visitation with the child.

Carlson, 16 Wn. App. at 597-98.

Wise as these considerations may have appeared, the Legislature promptly rejected them, amending the statute in 1977 to permit third-party visitation petitions "whether or not there has been any change of circumstances." In *Marriage of Klouse*, 30 Wn. App. 492, 494, 635 P.2d 773 (1981), the court characterized the amendment bluntly: "the impact of the 1977 amendment was to negate the requirement of showing a material change in circumstances."

The language construed in *Klouse* survives today intact in RCW 26.10.160(3), and I believe the majority's attempt to add a standing requirement is as misguided as was the *Carlson* court's attempt to add a threshold requirement. The statute itself contains the Legislature's standard for both threshold and standing, in its requirement that the visitation serve the best interests of the child.

Many considerations could explain a legislative decision to leave RCW 26.10.160(3) unamended. Grandparent visitation issues come most readily to mind. For if a custody action must be pending before a grandparent may petition, then a grandparent whose child is dead — as is the Troxels' son — and who can thus never expect an RCW 26.09 petition opportunity (because no petition will ever be pending under that chapter) also has no recourse under RCW 26.10 *unless* willing to allege the remaining

parent is unfit[19] — hardly a prelude to amicable relations among family members. Is there never then to be a circumstance where a child indeed has a fit parent, but also has strong ties to grandparents, warm and beneficial ties which the child's best interests call for protecting?

The limitations which public policy may place on such petitions are fertile grounds for debate. One may ask whether such petitions should be available at all in cases where both parents live with the children and oppose the petition, whether death or divorce or separation should affect, and, if so, how; whether adoption by a step-parent should affect, and so on.[20] But these are matters for the Legislature, and for now, the current statute expresses one policy approach: any person may petition at any time, so long as the child's best interests are served. It cannot be said that this approach is absurd, or even out of harmony with RCW 26.09.240.[21]

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19. The allegation required is that the child has no fit parent, or placement with an otherwise fit parent would be detrimental to the child. *See Custody of Stell*, 56 Wn. App. 356, 365, 783 P.2d 615 (1989).

20. These issues are frequent topics in the current legal literature. *See e.g.*, Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29 (1996).

21. As to the issue of constitutionality of nonparent visitation, I assume for purposes of this dissent the constitutionality of the present statute and expect to maintain that conclusion in the future, but proper analysis of those issues awaits their presentation on more extensive briefing than was submitted here.

I must thus respectfully dissent from the reasoning and result of the majority, and from its holding that under RCW 26.10.160(3), a custody petition must be pending before a visitation petition will lie.[22]

I would not simply affirm, however. The trial court here was not presented with any guidance as to the proper test to be applied in a case such as this. The findings necessary to order visitation over the objections of a parent are thus not in the record, and I would remand for further proceedings. And while I believe RCW 26.10.160(3) should not be read as incorporating the standing requirement of RCW 26.09.240, I would freely and generously borrow from RCW 26.09.240 its excellent, albeit not exhaustive, list of factors indicating whether third-party visitation is in the best interests of the child. See RCW 26.09.240(5)(a). A significant preexisting relationship, balanced against the impact on the existing family structure, is the framework. Within that framework, each case will be different. Because these factors were not addressed by the trial court, I would remand for further proceedings.

One final issue remains. These children have been adopted by their stepfather, or so the briefs advise us. Under *Mitchell v. John Doe*, 41 Wn. App. 846, 706 P.2d 1100 (1985), and *Bond v. Yount*, 47 Wn. App. 181, 734 P.2d 39 (1987), adoption — by strangers *or relatives* — terminates standing to petition for visitation. These holdings are premised on a privacy rationale:

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22. It follows that I must respectfully disagree with the opinion reaching the same result in *In re Visitation of Justin Ross Wolcott*, 85 Wn. App. 468, 933 P.2d 1066 (1997).

There is no policy stronger or more consistently followed in this state than that protecting the sanctity and privacy of adoptions. When an adoption has become final, previous ties to natural parents are completely severed and a wholly new relationship is created. The confidentiality of the new, as well as the defunct, relationship becomes virtually inviolate. The legislative policy concerning this transformation is reflected not only in the adoption statute, but in the probate code as well. This policy has been affirmed consistently by the courts. "The legislative policy of providing a 'clean slate' to the adopted child permeates our scheme of adoption." The strength of this policy is illustrated by the reaction of our courts to the latter day attempt, buttressed by a wealth of arguments, to strip the mantle of confidentiality from adoption records. That attempt has been firmly rejected.

Mitchell, 41 Wn. App. at 849-50 (citations and footnote omitted) (quoting *In re Estates of Donnelly*, 81 Wn.2d 430, 437, 502 P.2d 1163, 60 A.L.R.3d 620 (1972)).

Not only has the legislative concern for privacy lessened somewhat since *Mitchell*,[23] the rationale is inapplicable here in any event. Where a stepparent adopts, ties to one natural parent remain intact, and virtually no confidentiality

23. See RCW 26.33.295 (authorizing open adoption agreements) and RCW 26.33.343 (authorizing limited searches for birthparents of an adopted child).

concerns exist. I would therefore be cautious about applying the *Mitchell* rationale to these facts. Nor have the parties fully briefed the issues. I thus would not hold standing terminated upon the adoption.

In sum, I would remand. I therefore dissent.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED AND FILED JANUARY 3, 1996

SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

NO. 93-3-00650 7

In Re the Visitation of:

NATALIE ANNE TROXEL,
ISABELLE ROSE TROXEL,

Minors,

JENIFER TROXEL, and GARY TROXEL,
Paternal Grandparents,

Petitioners,

and

TOMMIE GRANVILLE, Mother,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(VISITATION)
(FNFCL)

I. HEARING/TRIAL

1.1 A trial was held on December 14, 1994 and December 19th, 1994.

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1.2 The findings are based on trial.

1.3 The following people attended: Petitioners and attorney MARY H. MCINTOSH, Respondent and their attorney DONALD BISAGNA; also, lay witnesses and expert witnesses, Tamar Groffman, a therapist, and Nora Young, PhD, psychologist.

II. FINDINGS OF FACT

Upon the basis of the court record, the court FINDS:

2.1 The petitioner is seeking visitation rights with the following children:

NATALIE ANNE TROXEL, DOB: 11/1/89
ISABELLE ROSE TROXEL, DOB: 12/24/91

2.2 BASIS OF JURISDICTION.

This state is the home state of the children because the children lived in Washington with a parent for at least six consecutive months immediately preceding the commencement of this proceeding.

2.3 BEST INTEREST OF THE CHILDREN.

The following facts are deemed in the best interest of the children:

2.3A. The children are the children of Respondent and the Petitioner's deceased son, Brad Troxel.

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2.3B. Brad Troxel died in May of 1993.

2.3C. The Petitioners brought this action in order to be awarded certain and specific visitation rights with the children.

2.3D. The Petitioners are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music.

2.3E. The court considered the best interests of the children as mandated by RCW 26.09/160 (3). The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' nuclear family. The court finds that the childrens' best interests are served by spending time with their mother and stepfather's other six children.

2.3F The experts did not have an opportunity to interview all parties. They neither interviewed the Troxels nor observed them with their grandchildren.

2.3G Expert Young based her opinion, in part, upon erroneous factual information, specifically the fact that one of the children slept in the bedroom in which the Petitioners' son committed suicide.

2.3H The court viewed a videotape of the children and the Petitioners.

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2.3I Having this balance in mind, the court finds that the Petitioners should be awarded the following visitation:

1. One weekend per month, starting on Saturday at 4:30 p.m. to Sunday at 6:00 p.m., starting with the month of March, 1994.

2. One Sunday in January and one Sunday in February, starting at 10:00 a.m. and ending at 6:00 p.m.

JUDGE MICHAEL RICKERT

Presented by:

s/ Mary H. McIntosh
MARY H. McINTOSH #12744
Attorney for Petitioners

APPENDIX D — VISITATION DECREE OF THE SUPERIOR COURT OF WASHINGTON FOR SKAGIT COUNTY DATED MAY 8, 1995

SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

No. 93-3-00650 7

In Re the Visitation of:

NATALIE ANNE TROXEL,
ISABELLE ROSE TROXEL,

Minors,

JENIFER TROXEL, and GARY TROXEL,
Paternal Grandparents,

Petitioners,

and

TOMMIE GRANVILLE, Mother,

Respondent.

VISITATION DECREE (DC)

I. JUDGMENT SUMMARY

Does not apply.

Appendix D

II. BASIS

The findings of fact and conclusions of law have been entered in this case.

III. DECREE

IT IS DECREED that:

3.1 DISPOSITION.

The petition is granted. The petitioner shall have visitation rights as set forth in paragraph 3.2.

3.2 VISITATION.

Visitation is ordered as follows:

1. One weekend per month, starting on Saturday at 4:30 p.m. to Sunday at 6:00 p.m., starting with the month of March, 1995.

2. One Sunday in January and one Sunday in February, starting at 10:00 a.m. and ending at 6:00 p.m.

3. One week in the summer, from Sunday to Sunday, which week will include the weekend above described from that month. The visitation will commence at 10:00 a.m. on the first Sunday and terminate at 6:00 p.m. on the last Sunday. The Petitioners will give thirty (30) days notice of the

week that they desire for that visitation. For purposes of this provision, the summer is defined as being from June 15th through September 1st. The Grandparents shall seek the approval of the Mother should they wish to take the children out of the county for an extended visitation. Should the Mother withhold agreement, the parties shall mediate the dispute at Common Ground, Mount Vernon, Washington. If grandparents go out of Skagit County, they shall inform the mother where they are going.

4. Four hours on each of the Petitioners' birthdays, at the Petitioners discretion, not to interfere with the childrens' school hours.

OTHER:

1. Respondent shall keep the Petitioners apprised of school and extracurricular events, such as school plays, open houses, sports events, performances and recitals, and the like.

2. All parties shall assure that the child, Isabelle, is called Isabelle, rather than her middle name "Rose".

3. The parties shall confer with regard to answering all questions as to the death of Brad Troxel. The Petitioners shall change the subject until a unified approach can be reached as to the answers to give the children.

4. Petitioners or either of them shall provide their portion of the transportation for the children, unless there is an emergency, then the Troxel adult children, (defined as the sons, the daughter and the daughters and sons in law) can provide the transportation.

5. The weekend visitation shall be held on the second weekend of each month, which is defined as the second time during the month that there is a Saturday or a Sunday.

6. Both parties may change any scheduled visitation, with ten days written notice. Should the Respondent/ Mother be changing a scheduled visitation, the Petitioners shall have the first choice of a make-up time and vice-versa, PROVIDED THAT the make-up weekend shall be the weekend before or the weekend after the scheduled visitation, *if at all possible* in order to meet the goals of this court order.

7. The Sunday visitation for the months of January and February of 1995 shall continue as under the prior order, i.e., the first weekend of each month.

8. The parties shall not disparage the other party in front of the children.

Responsibility for transportation shall be as follows: The Respondent or anyone at her designation, shall deliver the children at the commencement of the visitation and the Petitioners shall deliver the children at the termination of the visitation, subject to the terms above stated.

Appendix D

DATED this 8 of May 1995.

s/ Michael Rickert
JUDGE MICHAEL RICKERT

Presented by:

s/ Mary H. McIntosh
MARY H. McINTOSH #12744
Attorney for Petitioners

APPENDIX E — ORDER OF THE SUPREME COURT OF WASHINGTON DENYING MOTION FOR RECONSIDERATION DATED AND FILED APRIL 6, 1999

THE SUPREME COURT OF WASHINGTON

NO. 65605-3
(cons. with 65699-1 & 66207-0)

In re the Custody of SARA SKYANNE SMITH.

EDISON SMITH, et al.,

Respondents,

v.

KELLY STILWELL-SMITH,

Appellant.

In re Visitation Rights with JUSTIN ROSS WOLCOTT.

DAVID L. CLAY,

Petitioner,

v.

LISA WOLCOTT,

Respondent.

Appendix E

In re the Visitation of NATALIE ANNE TROXEL,
ISABELLE ROSE TROXEL.

JENIFER TROXEL, et ux.,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered the Motion for Reconsideration by Respondent/Smith, Petitioner/Clay and Petitioners/Troxel; the Motion for Reconsideration filed by Jennifer and Gary Troxel and the Motion to Strike Portion of Answer to Motion for Reconsideration.

Now, therefore, it is hereby

ORDERED:

That the Petitioner's Motion to Strike Portion of Answer to Motion for Reconsideration is granted. The answer filed on February 19, 1999, should be corrected on page 7 - 8 specifically the phrase "The Wynns have never prohibited the Troxels from seeing their children. Indeed, the weekend before their motion for reconsideration disingenuously made

Appendix E

the claim that 'important relationships' will be destroyed by the Court's decision, the Troxels visited the Wynne children." Counsel should file a corrected page seven and eight and the original will be corrected that is on file. Corrected pages should be filed within seven days from the date of this order. The motions for reconsideration are both denied.

DATED at Olympia, Washington this 6th day of April, 1999.

s/ [illegible]
CHIEF JUSTICE

Supreme Court, U.S.
FILED
AUG 17 1999
OFFICE OF THE CLERK

(2)

No. 99-138

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

♦

In the Matter of the Visitation of
NATALIE ANNE TROXEL AND
ISABELLE ROSE TROXEL, Minors.

JENNIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

♦

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Washington

♦

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

♦

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15pp

RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of the State of Washington err in holding that statutes granting "any person" the right to petition a court to order visitation with a child "at any time" improperly interfered with the constitutionally protected interest of fit, custodial parents to raise their children free of state interference?

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RESPONSE TO STATEMENT OF THE CASE

Tommie Granville and Brad Troxel lived together sporadically before Tommie stopped seeing Brad in June 1991, while she was pregnant with their second child Isabelle. After Tommie and Brad's separation, Brad's parents saw Natalie and Isabelle only during Brad's limited visitations.

Brad committed suicide on May 13, 1993. After Brad's death, Tommie became concerned that frequent visitations with Brad's many relatives were placing a great deal of stress on the children. On the advice of the children's counselor, Tommie and her new husband, Kelly Wynn, asked the Troxels to be supportive of the family, like their children's other three sets of grandparents and two sets of great-grandparents, and to accept a less intrusive role. The Wynns suggested that the Troxels visit one Sunday a month, and on birthdays and other special occasions and holidays. However, the Wynns resisted the Troxels' desire for overnight visits every other weekend, on all

the Troxel relatives' birthdays, for two weeks in the summer, and on other holidays.

The Troxels initiated this lawsuit to obtain the visitation they desired. They did not seek custody. They did not allege that the Wynns were unfit. The Wynns continued to allow the Troxels reasonable visitation even after the Troxels brought this lawsuit. The children's therapist testified that the Wynns' actions were in their children's best interest and that the Troxels' demands were self-directed and might be harmful to the children.

The trial court entered a "visitation plan" that ordered the Wynns to provide overnight visitation one weekend a month, one week in the summer, and four hours on each of the Troxels' birthdays. The plan required the Wynns to "confer with" and "notify" the Troxels regarding a wide variety of issues, including a requirement that the Troxels be notified of all school and extracurricular events, and that "the parties . . .

confer with regard to answering all questions as to the death of Brad Troxel."

The Washington Supreme Court accepted review of an intermediate appellate court's decision that the Troxels could not maintain this action because neither RCW 26.10.160 nor RCW 26.09.240 grants grandparents standing to seek visitation when a custody proceeding is not pending. ***Visitation of Troxel***, 87 Wn. App. 131, 137, 940 P.2d 698 (1997). The Washington Supreme Court as a matter of state law interpreted the visitation statutes at issue to allow "any person" to petition the courts for visitation "at any time," without limitation. Given its interpretation of the statutes, the court below was compelled to strike down the visitation statutes at issue as violative of the constitutionally protected interest of custodial, fit parents to raise their children without state interference in the absence of evidence of harm to the child. ***Custody of Smith***, 137 Wn.2d 1, 969 P.2d 21 (1998)

REASONS FOR DENYING THE PETITION

The Petition does not raise a significant undecided question of federal constitutional law, and this Court's consideration of the extraordinarily broad, standardless visitation statutes interpreted and struck down by the Washington Supreme Court would not reach the social issues touched upon in the Petition or addressed in other states with narrower grandparent visitation statutes. This Court should deny the Petition.

I. THIS COURT HAS ADEQUATELY ADDRESSED THE INTERESTS THAT MAKE THE WASHINGTON VISITATION STATUTES UNCONSTITUTIONAL.

Fundamental rights are those "long recognized at common law as essential to the orderly pursuit of happiness . . . ." ***Meyer v. Nebraska***, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). The long-recognized family autonomy right relied upon by the Washington State Supreme Court is derived not from blood ties alone, but from "the emotional attachments that derive from the intimacy of

daily association, and from the role it plays in 'promoting a way of life' through the instruction of children." ***Smith v. Org. of Foster Families for Equality and Reform***, 431 U.S. 816, 844, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977); *see also* ***Wisconsin v. Yoder***, 406 U.S. 205, 232, 92 S.Ct. 1526, 1641, 32 L.Ed.2d 15 (1972) ("The history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of the children is now established beyond debate as an enduring American tradition.").

Contrary to petitioners' assertions (Petition at 12-13), the Washington Supreme Court's decision has not "idealized" the nuclear family at the expense of the extended family or other social organizations. Instead, it is the daily intimacy of the custodial relationship that gives rise to the fundamental right to autonomous child rearing relied upon by the Washington Supreme Court to strike down the visitation statutes at issue. This Court has already adequately addressed and confirmed the

constitutional protection of that family autonomy right in ***Moore v. City of East Cleveland***, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed. 531 (1977).

Mrs. Moore lived with her son and two grandsons, one of whom was less than one year old when she began caring for him after his mother died. 431 U.S. at 496-97. Mrs. Moore challenged the constitutionality of a statute that criminalized her grandsons' residence in her home. In striking down the statute, this Court upheld "the tradition of uncles, aunts, cousins, and especially grandparents *sharing a household* along with parent and child . . . ." 431 U.S. at 504 (emphasis added).

This Court in ***Moore*** recognized that protecting such custodial family units is necessary and proper because "throughout our history . . . [o]ut of choice, necessity, or sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home." 431 U.S. at 505. In such situations, "[d]ecisions concerning child rearing, which ***Yoder***,

Meyer, . . . and other cases have recognized as entitled to constitutional protection, 'ong have been shared with grandparents . . . *who occupy the same household* . . . ." 431 U.S. at 505 (emphasis added). *See also* ***Michael H. v. Gerald D.***, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 634 (1989) (biological father had no constitutional right to seek visitation with child born into mother's marriage with another man); analysis of ***Moore*** in J. Bohl, ***The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases***, 49 Okla. L. Rev. 29, 37-48 (1996).

It is this custodial family autonomy right that was properly relied upon by the Washington Supreme Court in striking down the visitation statutes at issue. That a "third party initiates the intervention" (Petition at 10) in visitation actions under these statutes makes the invocation of the state's power more offensive, not less. Neither ***Moore*** nor any other case suggests that grandparents living outside the family have a right to invoke the power of the state to demand visitation with

children over a fit custodial parent's objections. This Court has adequately addressed the interests that make the Washington visitation statutes unconstitutional and this case is not a proper vehicle for review of those rights.

II. THE EXTRAORDINARILY BROAD WASHINGTON VISITATION STATUTES WOULD NOT BRING UP THE SOCIAL ISSUES ADDRESSED IN THE PETITION.

The cases cited in the Petition and in Justice Talmadge's dissenting opinion in the Washington Supreme Court interpret "grandparent rights" statutes that restrict standing or visitation in varying degrees of severity, not statutes such as those struck down by the Washington Supreme Court that would allow "any person" to seek visitation "at any time." For instance, the Kentucky case cited by the Smiths as proof of a conflict in state decisions that should be addressed by the Court considers a "grandparent rights" statute with explicit standards for standing and visitation. The Kentucky court noted that "[i]f the statute gave the grandparents the unrestricted right of visitation, there would be much less reluctance to declare it unconstitutional."

See ***King v. King***, 828 S.W.2d 630, 632 (Ky.) *cert. denied,* 506 U.S. 941, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992) (discussed in Petition at 9). This Court in fact denied certiorari three years after ***King*** in a Georgia case that struck down the Georgia grandparent visitation statute as unconstitutional under the U.S. Constitution. ***Brooks v. Parkerson***, 265 Ga. 189, 454 S.E.2d 769, *cert. denied*, 516 U.S. 942, 116 S. Ct. 317, 133 L. Ed. 2d 301 (1995).

The extraordinary breadth of the statutes struck down by the Washington Supreme Court would limit the utility of review in this case. The interpretation of these statutes to allow "any person" to seek court-ordered visitation "at any time," without limitation or meaningful standards, was a matter of state, not federal constitutional, law. The decision of the Washington Supreme Court irrevocably rests on that state law determination. This Court could easily affirm the Washington Supreme Court's decision that such standardless intrusion in matters of family life would be unconstitutional without

addressing the very different issues raised by statutes in other jurisdictions, which may reflect a reasoned legislative response to the consequences of various living arrangements on the best interests of children.

Likewise, the fact that the mother's husband has adopted the Troxel children could only have the effect of limiting the utility of review. Contrary to petitioners' assertions (Petition at 13), there is nothing in the record that suggests that Kelly Wynn adopted his wife's children in an attempt to cut off visitation by the Troxels. And as the majority opinion in the Washington Supreme Court did not rely on the adoption of the children in its statutory analysis, it would not be properly an issue before this Court in reviewing the visitation statutes.

The petitioners' wide-ranging speculation as to the types of family relationships that might justify court-imposed visitation demonstrates the Washington Supreme Court's wisdom in declaring unconstitutional a statutory scheme that fails to provide any standards whatsoever in any of the

situations addressed in the Petition at 16-17. This Court is not in the business of providing parameters for third party visitation statutes, yet that is what answering the societal questions posed by petitioners would require it to do. The extraordinarily broad Washington statutes would not bring up for consideration the social issues addressed in the Petition and this case is not a proper vehicle for review of these extrajudicial matters.

CONCLUSION

The Petition should be denied.

RESPECTFULLY SUBMITTED this 17th day of August, 1999.

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Attorneys for Respondent
Tommie Granville

(3)

No. 99-138

Supreme Court, U.S.
FILED
NOV 18 1999
CLERK

IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 6, 1999
CERTIORARI GRANTED SEPTEMBER 28, 1999

76pp

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RELEVANT DOCKET ENTRIES

SUPREME COURT DOCKET INFO 66207 0 10/07/99

IN RE THE VISITATION OF: NATALIE ANNE TROXEL, ET AL
STATUS: DISPO

JENIFER TROXEL, ET UX., V. TOMMIE GRANVILLE
CONSOL TO: 65605 3

DATE S DESCRIPTION STAT ACT FILED BY NO.

01/14/98 CHECK CASE INFORMATION COM 004
65699-1 AND 66207-0 CONSOLIDATED UNDER 65605-3

01/18/97 CONSIDERATION ON PETITION FOR REVIEW
HRD ATT 09656 0140
** ANSWER CONTAINS A REQUEST FOR ATTORNEY FEES ***
HRD ON: 01/06/98 AT: 0000
BY: JDG2 DECISION: GRA

11/18/97 PEND 010

11/18/97 PETITION FOR REVIEW FIL 011

Relevant Docket Entries

DATE S DESCRIPTION STAT ACT FILED BY NO.

11/18/97 COURT OF APPEALS
CASE FILE (POUCH) REC 012
2 FILES #36737-4-I; CLERK'S PAPERS; VERBATIM REPORTS; APP BRI 1; APP SUPP BRI 1; ADD'L BRIEF OF APP 0; RES BRI 0; REPLY BRI 0; SUPP RES BRI 0

11/18/97 NOTICE OF INTENT
TO WITHDRAW FIL ATT 07577 015
DONALD BISAGNA WITHDRAWS AS ATTORNEY OF RECORD FOR RES TOMMIE GRANVILL AND HEREBY CONSENTS TO THE SUBSTITUTION OF CATHERINE W. SMITH AS ATTORNEY FOR RES

11/18/97 ANSWER TO PETITION
FOR REVIEW FIL ATT 09542 016
SERVICE SHOWN
** CONTAINS A REQUEST FOR ATTORNEY FEES ***

11/18/97 AFFIDAVIT FIL 017
DECLARATION OF FINANCIAL NEED OF TOMMIE WYNN (F/K/A GRANVILLE)

01/06/98 SETMC 013
DEPT II

Relevant Docket Entries

DATE S DESCRIPTION STAT ACT FILED BY NO.

01/07/98 ORDER ON
MOTIONS READY FIL SCJ 02020 018
THE PETITION FOR REVIEW IS GRANTED IN 65699-1, 66207-0 AND 65605-3
ALL THREE CASES ARE CONSOLIDATED UNDER NO. 65605-3. COUNSEL ON EACH SIDE OF THE ISSUE WILL SHARE ORAL ARGUMENT TIME 327/64

01/07/98 ORDER CONSOLIDATING
APPEAL SCJ 02020 019
APPEAL 662070 CONSOLIDATED TO 656053
ALL FURTHER DOCKET ENTRIES TO BE MADE UNDER CAUSE NO. 65605-3

03/11/98 HEARD 020
ENTERED — SET FOR HEARING ON MARCH 11, 1998 — EN BANC 2ND CASE 30 MINUTES ALLOTTED FOR ORAL ARGUMENT

12/24/98 OPINION FILED FIL SCJ 07747 021
FAX $111 137 WN.2D 1

Relevant Docket Entries

DATE	S	DESCRIPTION	STAT	ACT	FILED BY	NO.
04/06/99		MANDATE	DISPO	FIL	SCL 03901	022
		CASES ARE MANDATED TO THE SUPERIOR COURT FROM WHICH THE APPEALS WERE TAKEN FOR FURTHER PROCEEDINGS TO INCLUDE A DETERMINATION OF COSTS AND ATTORNEY FEES 102/196				
07/14/99		LETTER		FIL		023
		FROM ATTORNEY MARK OLSON ADVISING A PETITION FOR WRIT OF CERTIORARI HAS BEEN FILED IN THE US SUPREME COURT AND REQUESTED THE RECORD IN THIS CASE BE PRESERVED				

Relevant Docket Entries

Court: Washington State Court of Appeals — Division 01
Case: Jenifer Troxel, et al, Respondents
vs: Tommie Granville, Appellant
Filed on: 06/07/95
Note: Notice of Appeal Case Disposition

Appellant:	Granville, Tommie
Appellant's Attorney:	for Granville, Tommie
Name:	Bisagna, Donald James Bar Number: 07577
Person Number:	ATT 07577
Organization:	Attorney at Law
Address:	Po Box 2237
City/State/Zip:	Mount Vernon, WA 98273-2237
Phone:	(360) 336-6675
Fax:	(360) 336-5040
Minor:	Troxel, Natalie Anne
Minor:	Troxel, Isabelle Rose
Respondent:	Troxel, Jenifer
Respondent's Attorney:	for Troxel, Jenifer
Name:	Olson, Mark David Bar Number: 09656
Person Number:	ATT 09656
Address:	1601 5th Ave Ste 2200
City/State/Zip:	Seattle, WA 98101-1625
Phone:	(206) 625-0085
Fax:	(206) 625-0176

Relevant Docket Entries

Respondent:	Troxel, Gary
Respondent's Attorney:	for Troxel, Gary
Name:	Mcintosh, Mary H.
	Bar Number: 12744
Person Number:	ATT 12744
Address:	1020 S 3rd
City/State/Zip:	Mount Vernon, WA 98273-4302
Phone:	(360) 336-3400
Fax:	(360) 336-1962
Respondent's Attorney:	for Troxel, Gary
Name:	Olson, Mark David
	Bar Number: 09656
Person Number:	ATT 09656
Address:	1601 5th Ave Ste 2200
City/State/Zip:	Seattle, WA 98101-1625
Phone:	(206) 625-0085
Fax:	(206) 625-0176
TRIAL JUDGE	
Name:	Rickert, Michael
Person Number:	TCJ 13465
OTHER PARTICIPANTS	
Name:	Rickert, Michael E.
Title:	Judge of The Superio
	To: 01/08/98
Organization:	Superior Court Judge
Address:	Skagit County Courthouse
City/State/Zip:	Mt Vernon, WA 98273

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
06/07/95	Status: Case Pending
06/09/95	NOTICE OF APPEAL Fee Paid Receipt #43819 Document Action: Filed
06/19/95	DESIGNATION OF CLERKS PAPERS Document Action: Filed
06/19/95	STATEMENT OF ARRANGEMENTS 12/14-19/1994 Document Action: Filed
08/30/95	REPORT OF PROCEEDINGS {9/5/95} From Meg Corpolongo For 12/14-19/1994; Document Action: Filed
09/06/95	NOTICE OF APPEARANCE Mark D. Olson Appearing For Respondents Document Action: Filed
09/07/95	REPORT OF PROCEEDINGS 1 Vol, 12/14-19/1994 Document Action: Received
09/25/95	OTHER FILING Declaration of Service of The Vrp From Appellant to Counsel For Respondents Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
10/05/95	APPELLANTS BRIEF Brief Sent 10-23-95 Filed By: Bisagna, Donald James (ATT 07577) Document Action: Filed
10/25/95	MONETARY AMOUNT, NOT FILING FEE Appellants Brief $9.74 Chk 9058 Recpt 44519 Document Action: Filed
10/30/95	CLERK'S PAPERS 1 Vol, Pgs 1 - 126; Bisagna Document Action: Filed
11/15/95	COURT'S MOT FOR SANCT FOR FAIL TO FI F/F Resp Bri Status: Stricken / Vacated Hearing Date: 12/08/95 Hearing Time: 00:00 AM Decision: Stricken / Vacated
11/21/95	OTHER FILING Mot For Ext to File Resp Brief, For Order Remanding For Entry of Findings And Conclusions & Ord Permitting App to File Additional Arguments if Necessary After The Findings Has Been Supplied. Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
11/21/95	MOTION TO EXT TIME TO FILE RESPOND B 11/27/95 – 1/15/96 Filed By: Olson, Mark David (ATT 09656) Status: No Action Necessary Calendared for: Kesler, Julie A. (COM 07369) Hearing Date: 12/08/95 Hearing Time: 09:30 AM Decision: No Action Necessary
11/21/95	OTHER MOTION To Remand For Presentation of Findings & Conclusions And to Permit Additional Arguments if Necessary After Findings Supplied. Filed By: Olson, Mark David (ATT 09656) Status: Decision Reached at Hearing Calendared for: Kesler, Julie A. (COM 07369) Hearing Date: 12/08/95 Hearing Time: 09:30 AM Decision: Granted
12/05/95	RESPONSE TO MOTION Response to Resp Mot to Ext Time For Filing Resp Brief And For Remand For Presentation And Entry of Findings & Conclusions Filed By: Bisagna, Donald James (ATT 07577) Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
12/13/95	CO RL ON MOTIONS Ordered That This Case is Remanded to The Skagit County Superior Court For Entry of Written Findings of Fact And Conclusions of Law Within Three Weeks of This Order. Ordered That Within 30 Days>>>>> Filed By: Kesler, Julie A. (COM 07369) Document Action: Filed
12/13/95	OTHER FILING (Rul Cont'd)>>> of Entry of The Findings Appellants Shall File A Supplemental Opening Brief or Advise This Court if They do Not Intend To File Such A Brief. Ordered That Respondents Brief Will be Due>>>>>
12/13/95	OTHER FILING (Rul Cont'd)>>>> 30 Days After Appellants Supplemental Brief.
01/03/96	OTHER FILING Check on Status of Findings in Trial Court Findings Entered in Trial Court 1/3/96 Document Action: Information — Not Filed
01/15/96	LETTER Copy of Letter Sent to Trial Court With Supplemental Des. (A Copy Of The Supp Des Was Not Included With The Letter) Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
01/18/96	DESIGNATION OF CLERKS PAPERS Respondent's Supplemental Document Action: Filed
01/22/96	EXHIBIT #1, 2, 3, 4, 5 Document Action: Filed
01/29/96	DESIGNATION OF CLERKS PAPERS Appellant's Supplemental Document Action: Filed
01/29/96	OTHER MOTION Motion For Ext to File Appellant's Supplemental Brief to 3/4/96 Filed By: Bisagna, Donald James (ATT 07577) Status: No Hearing Scheduled
01/31/96	NOTATION ORDER ON MOTIONS Granting Ext to File Appellant's Brief Until 3/4/96. However, no Further Extensions Should be Anticipated. Filed By: Noris, Anne Margaret (ACL 11333) Document Action: Filed
03/04/96	APPELLANTS SUPPLEMENTAL BRIEF {2/2/96}* 1/29/96(2/2-3/4) Nfxa Brief Sent 3/13/96 Filed By: Bisagna, Donald James (ATT 07577) Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
03/26/96	MONETARY AMOUNT, NOT FILING FEE Appellant's Supplemental Brief $28.80 Ck#2437 Rcpt#45107 Document Action: Received
04/26/96	MOTION TO EXT TIME TO FILE RESPOND B Filed By: Olson, Mark David (ATT 09656) Status: No Hearing Scheduled
04/30/96	NOTATION ORDER ON MOTIONS Granting Ext to File Respondent's Brief to 5/13/96. However no Further Extensions Should be Anticipated. Filed By: Noris, Anne Margaret (ACL 11333) Document Action: Filed
05/13/96	MOTION TO EXT TIME TO FILE RESPOND B Filed By: Olson, Mark David (ATT 09656) Status: No Hearing Scheduled
05/22/96	RESPONDENTS BRIEF {4/2/96} 10 Day Letter Sent 11/15/95* 11/21/95(11/27-1/15) Due 30 Days After Appellant's Supplemental Brief is Filed. Brief Sent 7/5/96 Filed By: Olson, Mark David (ATT 09656) Status: Ready for Oral Argument Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
06/11/96	CLERK'S PAPERS 1 Vol, Pgs 127-131; Bisagna Document Action: Filed
06/24/96	APPELLANTS REPLY BRIEF W/Service Brief Sent 7/25/96 Filed By: Bisagna, Donald James (ATT 07577) Document Action: Filed
07/10/96	OTHER CO RL Ordered That This Appeal is Referred to A Panel For Consideration On The Next Available Judges Motion Calendar Filed By: Verellen, James Richard (COM 06850) Status: Referred to Panel By Court Commissioner Document Action: Filed
07/10/96	OTHER MOTION Referred Per Commissioner's Ruling Status: Decision Reached at Hearing Calendared for: Agid, Susan R. (ACJ 01922) Hearing Date: 10/18/96 Hearing Time: 09:30 AM Decision: Granted
07/15/96	MONETARY AMOUNT, NOT FILING FEE Respondent's Brief $18.24 Ck#7737 Rcpt#45538 Document Action: Received

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
07/25/96	MONETARY AMOUNT, NOT FILING FEE Appellant's Reply Brief $10.15 Ck#9575 Rcpt#45608 Document Action: Received
10/11/96	LETTER Advising Counsel That This Case is Set For 10/18/96 on The Judges Calendar Without Oral Argument. Document Action: Sent
11/04/96	ORDER GRANTING PRIORITY Ordered That The Case is Set For Oral Argument Before The Undersigned Panel on The Earliest Possible Date During The Winter 1997 Term And it is Further Ordered Filed By: Cox, Ronald Edward (ACJ 05080) Document Action: Filed
11/04/96	ORDER ON MOTIONS Ordered That no Later Than 45 Days From The Date of This Order, The Parties Shall Simultaneously Submit Additiona Briefs, Not to Exceed 20 Pages Filed By: Cox, Ronald Edward (ACJ 05080) Document Action: Filed
11/25/96	OTHER FILING Change of Address For Mark Olson Called For Service 11/26/96 Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
12/18/96	APPELLANTS SUPPLEMENTAL BRIEF {12/19/96} no More Than 20 Pages Circ to Panel 12/19/96 Filed By: Bisagna, Donald James (ATT 07577) Document Action: Filed
12/18/96	OTHER FILING Appellant's Motion to Consider Additional Evidence. Circ to Panel 12/19/96 Document Action: Filed
12/18/96	MOTION TO EXT TIME TO FILE RESPOND B Ext to File Respondent's Supp Brief 12/19/96 – 12/14/96 Filed By: Olson, Mark David (ATT 09656) Status: No Hearing Scheduled
12/24/96	RESPONDENTS SUPPLEMENTAL BRIEF {12/19/96} no More Than 20 Pages *12/18/96(12/19-12/24) Service Filed 1/2/97 Circ to Panel 12/30/96 Filed By: Olson, Mark David (ATT 09656) Document Action: Filed
01/08/97	NOTATION ORDER ON MOTIONS After Consultation With The Panel, The Motion (To Consider Additional Evidence) is Granted. Filed By: Noris, Anne Margaret (ACL 11333) Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
01/09/97	A1 Ltr Sent 12/2/96 Status: Oral Argument Heard
01/15/97	DESIGNATION OF CLERKS PAPERS Appellant's Supplemental (At Request of Court) Document Action: Filed
01/28/97	CLERK'S PAPERS 1 Vol, Pgs 132-137; Appellant Document Action: Filed
07/28/97	OPINION We Reverse The Visition Decree And Dismiss The Troxel's Petition For Visition Filed By: Cox, Ronald Edward (ACJ 05080) Status: Decision Terminating Review Filed Document Action: Filed
08/04/97	COST BILL By Appellant, $1542.44 Filed By: Bisagna, Donald James (ATT 07577) Document Action: Filed
08/08/97	OTHER FILING Respondent's Motion For Reconsideration Circ to Panel 8/11/97 Chk 9/2/97 Filed By: Olson, Mark David (ATT 09656) Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
08/08/97	MOTION FOR RECONSIDERATION Filed By: Olson, Mark David (ATT 09656) Status: No Hearing Scheduled
08/25/97	RESPONSE TO MOTION Respondent's Objection to Cost Bill Filed By: Olson, Mark David (ATT 09656) Document Action: Filed
09/08/97	ORDER ON MOTIONS Ordered That The Motion For Reconsideration is Denied. Filed By: Cox, Ronald Edward (ACJ 05080) Document Action: Filed
10/08/97	PETITION FOR REVIEW W/$200 Filing Fee CK #2339 W/Serv Filed By: Olson, Mark David (ATT 09656) Document Action: Filed
11/14/97	COURT OF APPEALS CASE FILE (POUCH) To Supreme Court 1 T/C File; 1 Coa File; 2 Appellant's Briefs Document Action: Sent
11/21/97	LETTER From Supreme Court Advising The Case is Set on The 1/6/98 Calendar #66207-0 Document Action: Filed

Relevant Docket Entries

DATE	DESCRIPTION OF EVENT OR MOTION
01/08/98	OTHER FILING Copy of Order Granting Prv And Consolidating Under 65605-3 Document Action: Filed
01/08/98	Status: Case Disposition
03/26/98	OTHER ORDER Ordered That The Opinion Filed on 7/28/97 And Reported at 87 Wn.App. 131,940 P.2d 698 be Changed at The First Sentence of 3rd Full Paragraph. Filed By: Cox, Ronald Edward (ACJ 05080) Document Action: Filed
04/01/98	LETTER From Mr. Bisagna Advising he is no Longer Counsel on This Case. Ms Smith Filed A Notice of Appearance in Supreme Court But Not in This Court. The Order Entered 3/26/98 Has Been Forwarded to Ms. Smith Document Action: Filed
04/12/99	OTHER FILING Copy of Mandate Entered in Supreme Court Document Action: Filed

*** End of Docket ***

Relevant Docket Entries

Court: State of Washington — Skagit County Superior Court
Case: In RE Natalie Anne Troxel & Isabelle Rose Troxel — Domestic
Judge:
Filed On: 12/02/1993
Note: *Case Compltd 03/28/98*

Sub #	Date	Description	Secondary
	12/02/93	Filing Fee Received	110.00
1	12/02/93	Summons & Petition For For Visitation Proceeding	
2	12/10/93	Affidavit of Service	
3	12/29/93	Notice of Appearance	
4	02/04/94	Note For Motion Docket Visitation	02/14/94D4
5	02/09/94	Motion For Temporary Visitation By Grandparents	
6	02/09/94	Resp's Response to Pet For Visitation Rights	
7	02/10/94	Mt & Dclr For or Striking MT For Grandparents Visitation	

Relevant Docket Entries

Sub #	Date	Description	Secondary
8	02/10/94	Note For Motion Docket Strike by Ph, Mcintosh 2-11 Strike or – Rsp	02/14/94D4
9	02/10/94	Affid/ Nora Fleming Young, PH D	
10	02/11/94 02/14/94	Affidavit of Respondent Hearing Cancelled: Unknown Party Judge Mike Rickert	
11	03/16/94	Grandmother's Stmt RE Visitation	
12	03/16/94	Note For Motion Docket Temp or (Pt)	03/28/94D4
13	03/16/94	Affidavit of Service	
14	03/22/94	Resp's Response to Grandmother's Stmt RE Visitation	
15	03/22/94	Affidavit: Nora Young Phd	
16	03/25/94	Memorandum of Authorities Supportin Grandparent Visitation	

Relevant Docket Entries

Sub #	Date	Description	Secondary
17	03/28/94	Order Granting Grandpt Visitation(C MicroFilm 454-0819	
	03/28/94	Motion Hearing Commissioner Susan K. Cook	
18	04/15/94	Order Granting Grandparents Visitation — Amended Commissioner Susan K. Cook MicroFilm 455-2208	
19	08/24/94	Subpoena — Deposition Dr Nora Young	
20	08/24/94	Notice of Deposition Dr Nora Young	
21	09/08/94	Note For Motion Docket 1/2 Day — Mhm	09/19/94AS
22	09/19/94	Letter/Conflicts: Aty Bisagna	
23	09/26/94	Notice of Trial Date 12/14/94	
24	10/19/94	Notice of Vacation Schedule Bisagna, Donald James	

Relevant Docket Entries

Sub #	Date	Description	Secondary
25	11/29/94	Subpoena Duc Tec: Tommie Granville	
26	11/29/94	Subpoena: Christine Barber	
27	11/30/94	Notice of Deposition of Jenifer Troxel	
28	11/30/94	Notice of Deposition of Gary Troxel	
29	12/07/94	Subpoena For Tamar Groffman	
30	12/08/94	Subpoena: Nora Young Phd	
31	12/08/94	Affidv/Svc: Tamar Groffman	
32	12/13/94	Pretrial Affidavit of Respondent	
33	12/14/94	Exhibit List	
34	12/14/94	Deposition Published Jenifer Troxel	
34A	12/14/94	Non-Jury Trial Judge Mike Rickert	

Relevant Docket Entries

Sub #	Date	Description	Secondary
35	12/14/94	Deposition Pub Tommie Granville	
	12/14/94	Court Reporter Notes (2) Meg MicroFilm B-404	
	12/19/94	Court Reporter Notes Meg MicroFilm B-404	
36	12/22/94	Note For Motion Docket Enter Orders (Mhm)	01/03/95D4
37	01/03/95	Note For Motion Docket St/Phone/1-6-94/Atty Bisagna Final Papers (Djb)	01/09/95D4
38	01/05/95	Note For Calendar Entry of Orders	01/30/95D2
	01/09/95	Hearing Cancelled:def Atty Request Commissioner Susan K. Cook	
	01/30/95	Motion Hearing Judge Mike Rickert	
39	04/11/95	Ltr Frm Aty Bisagna to Aty Mcintosh	
40	04/13/95	Ltr FM Aty Mcintosh to Aty Bisagna	

Relevant Docket Entries

Sub #	Date	Description	Secondary
41	04/28/95	Note For Motion Docket Entry of Orders — MH Mcintosh	05/08/95D2
42	05/08/95	Visitation Decree Judge Mike Rickert MicroFilm 483-1330	
	05/08/95	Motion Hearing Judge Mike Rickert	
43	06/07/95	Notice of Appeal	
44	06/07/95	Affidavit of Mailing	
45	06/08/95	Transmittal Letter — Copy Filed Naca, $, Orders to CT of Appeals	
46	06/12/95	Receipt Frm Court of Appeals	
47	06/16/95	Designation of Clerk's Papers	
48	06/16/95	Affidavit of Mailing — Copy	
49	06/20/95	Nt of Perfection Frm CT of Appeals	
	08/30/95	Verbatim Rpt/Proc'g (1vol) Meg	

Relevant Docket Entries

Sub #	Date	Description	Secondary
50	09/01/95	Verbatim Rpt Transmitted to Ct/Appl	
51	09/11/95	Receipt For Verb Rpt From Ct/Appeal	
52	10/27/95	Transmittal Letter — Copy Filed Clks Papers Dsgntd by Aty Bisagna	
	10/27/95	Clerk's Papers — Fee Assessed	67.00
53	11/01/95	Receipt Frm CT of Appeals	
	11/14/95	Clerk's Papers — Fee Received	67.00
54	12/15/95	Motion to Reopen	
55	12/15/95	Note For Motion Docket Set Child Suppt — Nitteberg	01/08/96D4
56	12/19/95	Note For Motion Docket Spcl Set Bfr Rickert 01/03/96 9:15 AM — Mhm	
57	12/27/95	Declaration in Response to Petitioner's MT to Reopen Trial	

Relevant Docket Entries

Sub #	Date	Description	Secondary
58	01/03/96	Findings of Fact & Conclusions of Law Judge Mike Rickert	
59	01/03/96	Motion Hearing Judge Mike Rickert MicroFilm 502-1358	
	01/03/96	Court Reporter Notes Meg MicroFilm B-446	
	01/08/96	Hearing Stricken:in Court Nonappear Marilyn Nitteberg	
60	01/17/96	Designation of All Exhibits	
61	01/17/96	Declaration of Mailing	
62	01/18/96	Transmittal Letter — Copy Filed All Original Trial Exhibits to Ct of Appeals	
63	01/23/96	Receipt Frm CT of Appeals	
64	01/25/96	Designation of Clerk's Papers MicroFilm 505-1542	

Relevant Docket Entries

Sub #	Date	Description	Secondary
65	01/25/96	Declaration of Mailing	
66	06/10/96	Transmittal Letter — Copy Filed Pp's Designated by Aty Bisagna	
	06/10/96	Clerk's Papers — Fee Assessed	8.50
67	06/12/96	Transmittal Letter — Copy Filed Clerk Papers Desinate by D Bisagna	
	07/10/96	Clerk's Papers — Fee Received	8.50
68	01/14/97	Letter Frm Aty Bisagna to CT Clerk	
69	01/14/97	Designation of Clerk's Papers	
70	01/14/97	Declaration of Mailing	
71	01/27/97	Transmittal Letter — Copy Filed Designation of Aty Bisagna	
	01/27/97	Clerk's Papers — Fee Assessed	7.00

Relevant Docket Entries

Sub #	Date	Description	Secondary
72	01/29/97	Receipt(S) Frm CT of Appeals	
	02/11/97	Clerk's Papers — Fee Received	7.00
73	03/30/97	Mandate From CT of Appeal MicroFilm 572-0942	
74	04/08/99	Mandate From CT of Appeal MicroFilm 607-0524	
75	04/15/99	Letter From Supreme Court & Exhibits 1-4 (Didn't Receive 5 Frm Division I)	

*** End of Docket ***

Relevant Docket Entries

Sub #	Date	Description	Secondary
	12/02/93	Filing Fee Received	110.00
	10/27/95	Clerk's Papers — Fee Assessed	67.00
	11/14/95	Clerk's Papers — Fee Received	67.00
	06/10/96	Clerk's Papers — Fee Assessed	8.50
	07/10/96	Clerk's Papers — Fee Received	8.50
	01/27/97	Clerk's Papers — Fee Assessed	7.00
	02/11/97	Clerk's Papers — Fee Received	7.00

EXCERPTS FROM VERBATIM REPORT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY DATED DECEMBER 14, 1994 AND DECEMBER 19, 1994

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR SKAGIT COUNTY

Skagit County Cause No. 93-3-00650-7

Court of Appeals No. 36737-4-I

In Re the Visitation of:
NATALIE ANNE TROXEL
ISABELLE ROSE TROXEL,

Minors,

JENIFER TROXEL and GARY TROXEL,
Grandparents,

Petitioner,

vs.

TOMMIE GRANVILLE, Mother,

Respondent.

VERBATIM REPORT OF PROCEEDINGS

* * *

Excerpts from Verbatim Report of Proceedings

[OPENING STATEMENT BY MR. BISAGNA]

[9] * * *

Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured is why we [10] are here to date for this day.

* * *

. . . Basically the parents should have the say so as to when visitation should take place, and whenever visitation should take place — . . .

* * *

Again, grandparents, according [11] to the people we are going to be having come and testify say they are supposed to be in a supportive role. Parents should have the major say as to their children's lives and the visitation and normal visitation the experts will tell you is when the parents and children go over to the grandparents house or when the grandparents go over to the children's house and visit.

What's been happening is quite different. This is where the rub is. What's been happening is the grandparents are having separate birthday parties for the children; the grandparents are having separate Christmases for the children; the grandparents are calling Isabelle, Rose. Rose is Isabelle's middle name. Parents call Isabelle, Isabelle and grandparents call Isabelle, Rose.

The grandparent's son committed suicide in their house in June of 1993 or May of 1991?

MS. MCINTOSH: May of 1993.

MR. BISAGNA: Sorry, May of 1993. The information we have the grandparents have talked about the grandchildren's father without discussing it with the parents, without discussing how they want to handle it. These are all sorts of things that the experts find not nurturing to the children and [12] certainly not supportive of the parents and again, it has caused the trouble which leads us here today. Tommie Wynn, the mother of these two children, has told the grandparents she thinks that once a month is reasonable visitation and special days for the children, such as the children's birthdays and holidays. She thinks the grandparents should visit on those occasions as grandparents, not as the noncustodial parent would visit. The non-custodial parent might have —

* * *

[CROSS EXAMINATION OF JENIFER TROXEL BY MR. BISAGNA]

[57] * * *

Q. Do you think it would be appropriate for grandparents to support the parents and visit with the children as a family, a whole family, in other words the grandparents come to the parent's home or the parents and children coming to the grandparent's home?

A. When the relationship is normal.

Q. Is the relationship normal here?

A. At this point in time I do not believe it was normal.

Q. Is that because you had filed a lawsuit requesting the court to order a visitation?

A. Correct.

Q. Is that because Tommie had suggested to you she thought one day a month, did she say special days, too, one day a month and special days was appropriate?

A. I don't recall the term "special days" but one day.

Q. I believe you told your counsel you didn't think you [58] ought to see the children, you don't think you ought to see the children on holidays because it might be disruptive on family life. You have to answer out loud so the court reporter can take it down?

A. The petition, yes. That's correct.

Q. Is that your position now?

A. We are asking the Court for specific court ordered days, anything that we can get outside of that would be cherished.

Excerpts from Verbatim Report of Proceedings

Q. Is it still your position that holidays, visiting on holidays would be too disruptive on the family, the family of Tommie, Kelly, Natalie and Isabelle?

A. It could or it could not. It would be depending upon how the visitation was structured.

Q. Do you visit with, I'm sorry, you do visit with your other grandchildren on holidays?

A. Yes.

Q. You do visit with them on birthdays?

A. Yes.

Q. Do you ever visit with them alone when parents aren't there?

A. They have visited in our home without their parents, yes.

Q. I'm talking about visiting rather than babysitting?

A. Yes.

[59] Q. And how often does that occur, ma'am.

A. Maybe as often as once a month.

Q. How long are you with the children during these once a month visits, ma'am?

Excerpts from Verbatim Report of Proceedings

A. An afternoon.

Q. Do you have them overnight?

A. We have, yes.

Q. What's the occasion you'd have them overnight?

A. Usually parents wanted to get away.

Q. Any other times than that, ma'am?

A. The oldest granddaughter, she is just a joy to have around, she likes to stay at grandma's house.

Q. How old is she?

A. She is eight and a half.

* * *

[DIRECT EXAMINATION OF DR. GROFFMAN BY MR. BISAGNA]

[70] * * *

Q. I asked you whether or not there was an appropriate grandparent grandchild visitation, you said process or scheduled.

A. I think an appropriate grandparent grandchild visitation is one that is aimed at what the child's needs are, and

that those needs are primary. And that will be consistency between grandparents and grandchild, that the grandchild have a sense of security about being able to have time with the grandparent if it is a grandparent who is involved with a grandchild.

Q. Thank you very much. You answered three of my [71] questions with that answer. You stated that the child's needs are primary, is that correct?

A. Yes.

Q. How do you relate in the scheme of things grandparent, parent, child, the needs of the grandparent in this process?

A. Well, I say child's needs are primary, because the child is the individual who is still forming, so that the process of parenting is one that should enhance development and support development, and then the next family members who, extended family members who are not part of the nuclear family, I would see that their roles would also have to do with furthering development of all children in the family. I know we are talking specifically about these two children.

Q. What's the parent's role, if any, in this situation or in this relationship between the grandparent and grandchildren?

A. The parent's role is one of encouraging a relationship, not undermining grandparent relationship with the child. I see that role as being important for any of the adults in the family, not restricted to the parents.

Q. What's the grandparent's role with the, I think you said nuclear family. I guess I take it on the parent [72] and children?

A. Right.

Q. What is the grandparent?

A. Again, the point is to further development of children in the family, and their role is to be supportive and loving and not undermine the relationship between the children and their parents or other individuals in the family.

Q. If there was to be a decision maker as to grandparent grandchild visitation with children of say the ages two to five or two to six, who would be the decision maker?

A. Parents, definitely.

Q. Do you agree with the philosophy what is in the best interest of the children what we should all be looking at?

A. Absolutely.

Q. Are your opinions based upon what's in the best interest of the children?

A. They are.

* * *

Excerpts from Verbatim Report of Proceedings

[75] * * *

Q. If a situation exists where there are grandparents and there are the paternal grandparents, the father is dead, no longer alive and the mother and grandchildren, that is the situation we have, would your opinions change regarding grandparent grandchildren visitation because of the death of the son, or the father of the children? Is my question at all clear to you?

A. No, it wouldn't change. The overriding activity in that situation versus one where the parent is alive is the fact that the children are having to experience one of the most major losses that they have ever experienced in their lives and that has significant profound affect on those children, so that it is even more important for the adults that are involved with those children to be very clear with each other and supportive of each other's efforts with the children.

Q. Would you in any way suggest it is in the best interest of the children for the grandparents in that situation to have more visitation, because their son, the father of the children, is dead?

[76] A. I don't see that has anything to do with that.

Q. I'm asking because we all need to know. How does a death of the parent affect the children and what they need?

A. Loss of a parent is one of the most damaging, psychologically damaging experiences that a child can

Excerpts from Verbatim Report of Proceedings

have. It affects young children. I don't have to predict it on young, it affects children in that they become much more anxious and have a much, much greater need for security and stability. They cling, they can have nightmares, they can behave, the technical term for it is regressed. That means they behave as if they were much younger. They can have periods of time where they seem to be doing fine and then suddenly behave in a much more regressed and unpredictable way. They can have long periods of time of feeling very angry and defiant and angry outbursts.

* * *

[82] * * *

Q. . . . If the grandparent, in this case Jenifer Troxel, blames Tommie, the surviving wife, for her son, Brad's, suicide, what affect might that have on the best interest of these two children, Natalie and Isabelle?

A. You're asking me if I have an opinion about that or answer that question?

Q. Answer that question.

A. That would be very damaging to the children. Survivor's family, family members of survivors of suicide have a lot of emotion to deal with as a result of the suicide and whether or not that spills out on to the kids and when the only surviving parent that these two children have is blamed, that is extremely damaging to the child's

development as well as their sense of security and safety in the world at the present, because their loyalty is always being pulled on.

* * *

[83] * * *

Q. If they can't agree how to handle this situation?

A. It will be very damaging to these kids so long as that disagreement exists.

* * *

[88] * * *

A. . . . If they are unable to resolve the dispute regarding how to handle?

Q. Brad's suicide.

A. The communicating to the kids about Brad's suicide?

Q. The question is how would that affect your opinion regarding grandparent visitation, I guess is what I'd like to ask.

A. I think that the visitation should be more limited when there is a dispute about something so significant to the children's development.

Q. Thank you very much.

* * *

[89] Q. The Troxeles are requesting every other weekend from Friday until Sunday, Friday evening until Sunday evening, two weeks in the summer, and I think that's all she said in her direct examination. What is your opinion of that kind of a visitation schedule in this case?

MS. MCINTOSH: Objection, it doesn't state Troxeles' testimony correctly. Mrs. Troxel wants second and fourth weekends except two months of the year, May and December.

MR. BISAGNA: I apologize. That is accurate, second and fourth weekends and in every month except May and December they want first and third weekends but also two weeks in the summertime.

A. What is my opinion of that?

Q. What is your opinion of that type of visitation for Natalie and Isabelle?

A. That is excessive to me. It is much more in line with what gets set up for a non-custodial parent in a parenting plan rather than grandparents.

Q. What's wrong with that in this particular case, ma'am?

A. One of the things that is wrong with it is the conflict between the two households, and the effect on the kids, I

think the kids get pulled on [90] emotionally and it is not something that's being supported by both these parents, the grandparent and parent unit, so they are not, it is not, kids are not focused. They are not the main focus in terms of their needs. It is grandparent's needs that are in question.

* * *

[91] * * *

Q. Is there then a difference between a non-custodial parent and visitation with his or her children and a grandparent and visitation with their grandchildren?

A. Yes.

Q. Have you already told us what the distinction is or is there something else you need to say?

A. Well, privacy of the parent, father, mother, child relationship and the grandparent, aunts and uncles and cousins are a degree removed.

Q. When there is a dispute over visitation in your [92] opinion who should decide visitation?

A. The parents.

Q. Why?

A. Because ultimately they are responsible for the development, raising this child. And they need to have

the control, the authority, the responsibility, and information to make those decisions.

Q. Thank you. If you have already answered this I'm sure there will be an objection. What is in the best interest of the children, for Isabelle and Natalie, in this case as far as visitation for this case?

A. I think the plan that Tommie has recommended is in their interest.

Q. Is it in their best interest?

A. Yes.

Q. What's the nature of the relationship between these grandparents, paternal grandparents and Tommie Wynn?

A. It appears to me to be conflicted or we wouldn't be sitting here today.

* * *

[CROSS EXAMINATION OF DR. GROFFMAN BY MS. MCINTOSH]

[99] * * *

Q. . . . Let me rephrase. If the Troxeles and Mrs. Wynn determine a unified approach on how to communicate with the children on the children's death as they go, that conflict then is resolved, would your opinion as to one six hour visit a week change?

A. Yes.

* * *

[102] * * *

Q. What did she tell you the extent and nature of the alcoholism in the Troxel family?

A. That Brad had received alcohol treatment and that she had concern about amount and frequency of local use in the Troxel family.

Q. Were her concerns about the amount and frequency of use of alcohol in the Troxel family related to Gary and Jenifer Troxel or the siblings, aunts and uncles [103] of the children?

A. I don't recall that.

Q. What did she say was the amount and frequency of alcohol use in the Troxel family?

A. I didn't ask her specifics like that because the Troxel family wasn't the focus of therapy, the children and needs around the children were.

Q. Would your opinion change if you learned or were convinced there was no alcoholism or drug abuse in the Troxel family?

A. Of course.

Q. Did Tommie Granville also state to you she has concerns with how her children's father's suicide is being represented to the girls by the Troxel family?

A. Yes.

Q. What if anything did she say, where, from where came her concerns, what facts, in other words the children talking, telephone calls she overheard, what?

A. Children talking, I remember and I know there were other examples that over time she brought in. I don't remember what the source of that information was.

Q. Did the children talk to you?

A. No, not about that. I have talked with the children but not in a therapy relationship.

[104] Q. Isn't it true you talked to the children on one occasion?

A. No, children have been there because of child care problems. They have probably been to four or five times I have seen them. They have been in the office for a period of time.

Q. Of those four or five times, though, isn't it true you didn't speak to them each time?

A. I spoke to them. I didn't speak to them as a therapist.

Q. Similarly she related to you Troxel family is blaming her for the suicide?

A. Yes.

Q. You were of the opinion in your testimony prior to lunch that these children needed consistency. Would that also go to the consistency of seeing the Troxel family the same frequency and duration they saw the Troxel family prior to this litigation?

MR. BISAGNA: I'm sorry, prior to what?

MS. MCINTOSH: This litigation, prior to today.

A. It would depend. I think there are a number of factors there. I have been paying attention to grandparent visitation, and my understanding from you is that there was visitation that when their dad was [105] alive he would take them to his parent's home frequently, and that was in the context of parent visitation.

Q. Let me ask my question slightly differently. You discuss consistency relative to the child's need for grandparent visitation, do you recall that?

A. Yes.

Q. That also after a death of a parent that children do need a sense of security and consistency?

A. Yes.

Q. And would that not be served by a similar pattern of visitation with extended family after a death?

A. Depending on the nature, the emotional atmosphere of that visitation, consistency is one of the factors, emotional atmosphere is another factor, what happens in the home is another factor.

Q. Now, you also surrounded your opinions regarding the ultimate issue in this case relative to conflict. What other conflict do you believe exists between the two parents other than the how-to to deal with the children about their father's death, what other conflict?

A. There is a conflict of how frequent to visit.

Q. Any other conflict other than that?

Q. In other words are they conflicted on values or [106] discipline or on anything, religion or do you know of anything else?

A. I don't know of anything else.

* * *

[DIRECT EXAMINATION OF GARY TROXEL BY MS. MCINTOSH]

[115] * * *

Q. Have you ever discussed Brad's, cause of Brad's death with Natalie and/or Isabelle?

A. No.

Q. If ever the time came when they, it was time to discuss that, would you desire to have a unified approach with Mrs. Wynn?

A. Yes, certainly.

* * *

[DIRECT EXAMINATION OF DR. YOUNG BY MR. BISAGNA AND CROSS EXAMINATION BY MS. MCINTOSH]

[138] * * *

BY MR. BISAGNA:

Q. Based upon your training and experience and your education and the items we have talked about before, do you have an opinion as to what visitation scheduled for Natalie and Isabelle would be in their best interest?

A. Yes, I believe the schedule by Mr. and Mrs. Wynn would be customary and usual for grandparents.

Q. Why would that be in their best interest?

A. It is in the best interest of the children always to support the parents. The grandparents' role is one to support the parents.

Q. In your opinion who should have final say so as to grandparent visitation, the parent or grandparents?

[139] A. The parents.

* * *

[143] * * *

Q. In your opinion would grandparent visitation with grandchildren be significantly altered in the grandparent's child, in this case father of the children, died, should their visitation be any different because of it?

A. No.

Q. Why not?

[144] A. Because more accelerated visitation schedule doesn't necessarily meet the child's needs. It may meet the adults but not the child.

Q. Would meeting the adult's needs necessarily be in the child's best interest?

A. Usually not.

Q. If the grandparents here, Troxeles, tip top best grandparents in the world, what would your recommendation be to the Court regarding visitation with Natalie and Isabelle?

Excerpts from Verbatim Report of Proceedings

A. I would support the visitation schedule proposed by Tommie Wynn because it is the usual, customary and the one best tolerated by very young children.

* * *

CROSS EXAMINATION

BY MS. MCINTOSH:

* * *

Q. You just testified there is no difference between grandchild or grandparent visitation if there was a death of a parent. Do you believe it is important that children know and are exposed to their family [145] heritage of a parent who died?

A. Of course.

Q. And if you were faced with a situation where surviving parent was unable to expose children to that family heritage, would you encourage the Court to order grandparent visitation?

A. I do want grandparent visitation, certainly. The customary and usual grandparent visitation. I think grandparents are very important. I'm one myself.

* * *

Excerpts from Verbatim Report of Proceedings

[149] * * *

Q. There are exceptions to your rule that parents today have discretion in parent's role?

A. Absolutely.

Q. Just one moment. I would like to ask you this. You rendered an opinion for the setting up of temporary visitation in this case early spring, right?

A. Yes.

Q. And in making that opinion your opinion was the same as it is today, was it not?

A. Yes.

Q. In making that opinion you are concerned about the fact that Mrs. Troxel had required that the children sleep in the room where their father had committed suicide, were you not?

[150] A. Yes.

* * *

Excerpts from Verbatim Report of Proceedings

[REDIRECT EXAMINATION OF DR. YOUNG BY MR. BISAGNA]

[159] * * *

Q. Do you have an opinion as to whether or not overnight visitation, any overnight visitation with Natalie and Isabelle and the paternal grandparents is the best for the children?

A. I'd like to see overnight visitation delayed until the family is much more stable and children are a little bit older. Our children get anxious when they are separated from their parents, they often feel abandoned. They don't have a sense of time. Usually bedtime they are wondering when mom is going to come and get them. Little people are not always rational, they are emotional. At this age they are very easily disturbed.

Q. Do you feel it would be in the best interest of the children to have any overnight visitation with the [160] Troxeles?

A. Not at this age. I'd like to see them a little bit older when they understood mom and dad would come and get them in the morning.

* * *

Q. Just to make sure I clearly understand your testimony, in this situation, as we have it today, you believe that Tommie should have discretion regarding grandparent visitation, is that accurate?

Excerpts from Verbatim Report of Proceedings

A. Yes.

* * *

[RE-CROSS EXAMINATION OF DR. YOUNG BY MS. MCINTOSH AND CROSS EXAMINATION BY MR. BISAGNA]

[163] * * *

Q. So has there been any contact given to you by the children that they were traumatized or bothered or anything else or scared or anything the time they spent all night with the Troxeles?

A. A little anxiety, seemed to be anxious, they have not [164] been traumatized. They enjoy their visits.

* * *

[DIRECT EXAMINATION OF TOMMIE WYNN BY MS MCINTOSH]

[186] * * *

Q. Did you ever, when you separated from Brad Troxel, he had parenting time with the children, isn't that correct?

A. Yes.

Q. And eventually that was reduced to a court order [187] signed by Skagit County Superior Court Commissioner, isn't that true?

A. Yes.

* * *

[190] * * *

Q. Turning to Page 18, my question was, "Did you ever interfere with telephone contact with the children"? And your answer was, I'm going to ask if this was your answer, "There was a phone call in February of 1994 that I stated to Mrs. Troxel that our psychologist felt it was best Mrs. Troxel communicate through cards and notes until this action was settled; but prior to that I did not interfere with any phone calls." Did you make that statement?

[191] A. Yes.

Q. Now, isn't it true that you have no facts known to you that Mrs. Troxel ever inappropriately discussed the death of Brad Troxel with your children, isn't that true?

A. Yes.

Q. And isn't it also true that you have no personal information with regard to any alcohol abuse currently in the Troxel household, Jenifer and Gary Troxel?

A. Yes.

Q. You have stated in a sworn statement as part of your pre-trial affidavit that you believe that Jenifer and Gary

Troxel blame you for the suicide of their son. Now, do you have any personal information that they have ever manifested that blame in the presence of the children, have they ever shown any of that blame in the presence of the children?

A. I'm never with them when they are with the children, so I don't know.

Q. You have no personal information, even from the children, that they have stated that, isn't that true?

A. Yes.

Q. But would it be a fair statement that you do have [192] some fear of that?

A. Yes.

Q. Now, you have also stated that you believe that, at least last February and March, you stated that you believe the Troxeles were unstable people. Do you have any personal facts or information that they are unstable at this time?

A. No.

Q. At the time that you were taking children to see Doctor Young, which started, did it not, in January of '94?

A. Yes.

Q. Isn't it true at that time that you knew that the children had never stayed all night with the Troxeles since the father's death?

A. Yes.

Q. Isn't it also true that you knew they did not require the children to stay in the father's room?

A. They had not spent the night there. They hadn't had an opportunity to.

Q. Isn't it also true you were aware as of the letter, as of the date of the letter attached to your pre-trial affidavit, that was the end of January, that is in deed what Doctor Young was basing, one of things she was basing her opinion on?

[193] A. That's what she wrote in her statement.

Q. That was the end of January, isn't that true?

A. I don't remember.

Q. I'd just like to hand you your pre-trial affidavit, just so you can refresh your recollection and look at the exhibit attached to it, please.

A. Is there a date I'm supposed to be looking for?

Q. On the exhibit.

A. Okay.

Q. What is that date?

A. January 15th.

Q. 19?

A. '94.

Q. Did you see that the anywhere around January or end of January?

A. I'm sure I did.

Q. Have you ever had any experiences of conflict with Mr. or Mrs. Troxel in the presence of the children?

A. No.

* * *

[194] * * *

CROSS EXAMINATION

BY MR. BISAGNA:

* * *

Riley Wynn, off to the left-hand side is seven months old, she is the little girl that has been in the courtroom?

A. Right.

Q. She is yours and his?

A. Right.

Q. Who is Riley's grandparents?

A. Tom and Sylvia Wynn and Linda and Robert St. Clair, Les and Kay Crosby.

Q. Natalie Troxel and Isabelle Troxel, Les and Kay Crosby?

[195] A. Crosby.

Q. And Linda and Robert St. Clair and Jenifer and Gary Troxel, is that correct?

A. Right.

Q. And Jessie Granville, Hallie Granville and Roth Granville, who are the grandparents of all those kids?

A. Jack Granville, Joan Granville, Linda and Robert St. Clair and Les and Kay Crosby.

Q. And Ryan Wynn and Kevin Wynn, who are the grandparents of those children?

A. Tom and Sylvia Wynn and I do not know the name of the other grandparents.

Q. Are there two sets of grandparents for Ryan and Kevin?

A. Yes, sir.

Q. You really do have a family of yours, mine and ours, is that correct?

A. Absolutely.

Q. And it looks like there are probably three sets of grandparents for Riley, Natalie and Isabelle?

A. Yes.

Q. Is there a schedule of visitation, I don't mean schedule as in written down or authorized by the Court or anything, is there a pattern of visitation [196] by the various sets of grandparents for the various sets of grandchildren?

A. Yes, there is.

Q. What is that pattern?

A. Each set of the grandparents that live near us usually have them about one afternoon a month.

Q. How did that come about, that they have them one afternoon a month?

A. They usually call and set it up with us ahead of time.

Q. Is that the same visitation schedule you'd like to see for the Troxeles, one afternoon?

A. Yes.

* * * *

DECREE OF ADOPTION OF ISABELLE ROSE OF THE SUPERIOR COURT OF SKAGIT COUNTY, WASHINGTON DATED AND FILED OCTOBER 28, 1996

IN THE SUPERIOR COURT OF
SKAGIT COUNTY, WASHINGTON

NO.

In the Interest of:

Infants:
NATALIE ANNE TROXEL, and
ISABELLE ROSE TROXEL

persons under the
age of eighteen

DECREE OF ADOPTION OF
ISABELLE ROSE

CLERK'S ACTION REQUIRED

I. CLERK'S ACTION

The Clerk of this Court is directed, upon payment of the customary fee, to provide counsel of record, Donald J. Bisagna, with five (5) certified copies of this decree.

II. BASIS

THIS MATTER has come on regularly for hearing before the undersigned, a regularly appointed and acting Judge of the above entitled Court on the petition of Kelly Thomas

Wynn, for a decree of adoption as to the above-named infant, Isabelle Rose Troxel. Said child was born on December 24, 1991, in Skagit County, Washington. The Court has previously made and entered its Findings of Fact and Conclusions of Law and has full and complete jurisdiction over the parties to this action and this subject matter. The Court has also determined that the Indian Child Welfare Act and the Soldiers and Sailors Civil Relief Act of 1940 do not apply to this proceeding. The Court does therefore,

III. ORDER

ORDER, ADJUDGE, and DECREE that the petition of Kelly Thomas Wynn, husband of the above-named infant's natural mother, Tommie Joann Wynn, is hereby granted. Infant, Isabelle Rose Troxel, born on December 24, 1991, in Anacortes, Washington, and domiciled in Anacortes, Skagit County, Washington when these proceedings commenced, is constituted the child of the petitioner, and he is hereby constituted a parent of this child in the same degree and effect as if the child had been born as the issue of the marriage existing between the petitioner and the infant's natural mother.

ORDERED, ADJUDGED and DECREED that the name of this minor child is hereby changed and established to be ISABELLE ROSE WYNN. It is further authorized and requested that a certificate of birth of the child, now ISABELLE ROSE WYNN, be issued by the Washington State Vital Statistics Office, in the usual form pursuant to adoption information furnished by petitioner to this Department. It is further ordered that all records of this

Department and the files in this case in connection with this child are to remain secret and to be disclosed only upon an order of the above-entitled Court for good cause shown.

ADOPTION SUMMARY

1. Full original name of the person to be adopted:

   ISABELLE ROSE TROXEL

2. Full new name of the person adopted:

   ISABELLE ROSE WYNN

3. Adoptee's actual or determined date of birth:

   December 24, 1991

4. Adoptee's actual or determined place of birth:

   Anacortes, Skagit County, State of Washington

5. Full name of petitioner:

   Kelly Thomas Wynn

6. Status of petitioner:

   Step parent

7. Indian Welfare Act:

   Does not apply

8. Soldiers and Sailors Civil Relief Act of 1940:

   Does not apply

DONE IN OPEN COURT this 28th day of October, 1996.

s/ Stanley K. Bruhn
Honorable Stanley K. Bruhn

Presented by:

s/ Donald J. Bisagna
Donald J. Bisagna, WSBA #7577
Attorney for Petitioner

DECREE OF ADOPTION FOR NATALIE ANNE OF THE SUPERIOR COURT OF SKAGIT COUNTY, WASHINGTON DATED AND FILED OCTOBER 28, 1996

IN THE SUPERIOR COURT OF
SKAGIT COUNTY, WASHINGTON

NO. 96-5-00140-0

In the Interest of:

Infants:
NATALIE ANNE TROXEL, and
ISABELLE ROSE TROXEL

persons under the
age of eighteen

DECREE OF ADOPTION FOR
NATALIE ANNE

CLERK'S ACTION REQUIRED

I. CLERK'S ACTION

The Clerk of this Court is directed, upon payment of the customary fee, to provide counsel of record, Donald J. Bisagna, with five (5) certified copies of this decree.

II. BASIS

THIS MATTER has come on regularly for hearing before the undersigned, a regularly appointed and acting Judge of the above entitled Court on the petition of Kelly Thomas

Wynn, for a decree of adoption as to the above-named infant, Natalie Anne Troxel. Said child was born on November 1, 1989, in Skagit County, Washington. The Court has previously made and entered its Findings of Fact and Conclusions of Law and has full and complete jurisdiction over the parties to this action and this subject matter. The Court has also determined that the Indian Child Welfare Act and the Soldiers and Sailors Civil Relief Act of 1940 do not apply to this proceeding. The Court does therefore,

III. ORDER

ORDER, ADJUDGE, and DECREE that the petition of Kelly Thomas Wynn, husband of the above-named infant's natural mother, Tommie Joann Wynn, is hereby granted. Infant, Natalie Anne Troxel, born on November 1, 1989, in Anacortes, Washington, and domiciled in Anacortes, Skagit County, Washington when these proceedings commenced, is constituted the child of the petitioner, and he is hereby constituted a parent of this child in the same degree and effect as if the child had been born as the issue of the marriage existing between the petitioner and the infant's natural mother.

ORDERED, ADJUDGED and DECREED that the name of this minor child is hereby changed and established to be NATALIE ANNE WYNN. It is further authorized and requested that a certificate of birth of the child, now NATALIE ANNE WYNN, be issued by the Washington State Vital Statistics Office, in the usual form pursuant to adoption information furnished by petitioner to this Department. It is further ordered that all records of this

Department and the files in this case in connection with this child are to remain secret and to be disclosed only upon an order of the above-entitled Court for good cause shown.

ADOPTION SUMMARY

1. Full original name of the person to be adopted:

   NATALIE ANNE TROXEL

2. Full new name of the person adopted:

   NATALIE ANNE WYNN

3. Adoptee's actual or determined date of birth:

   November 1, 1989

4. Adoptee's actual or determined place of birth:

   Anacortes, Skagit County, State of Washington

5. Full name of petitioner:

   Kelly Thomas Wynn

6. Status of petitioner:

   Step parent

7. Indian Welfare Act:

   Does not apply

8. Soldiers and Sailors Civil Relief Act of 1940:

   Does not apply

DONE IN OPEN COURT this 28th day of October, 1996.

s/ Stanley K. Bruhn
Honorable Stanley K. Bruhn

Presented by:

s/ Donald J. Bisagna
Donald J. Bisagna, WSBA #7577
Attorney for Petitioner

FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED AND FILED JANUARY 3, 1996

SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

NO. 93-3-00650 7

In Re the Visitation of:

NATALIE ANNE TROXEL,
ISABELLE ROSE TROXEL,

Minors,

JENIFER TROXEL, and GARY TROXEL,
Paternal Grandparents,

Petitioners,

and

TOMMIE GRANVILLE, Mother,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(VISITATION)
(FNFCL)

I. HEARING/TRIAL

1.1 A trial was held on December 14, 1994 and December 19th, 1994.

1.2 The findings are based on trial.

1.3 The following people attended: Petitioners and attorney MARY H. MCINTOSH, Respondent and their attorney DONALD BISAGNA; also, lay witnesses and expert witnesses, Tamar Groffman, a therapist, and Nora Young, PhD, psychologist.

II. FINDINGS OF FACT

Upon the basis of the court record, the court FINDS:

2.1 The petitioner is seeking visitation rights with the following children:

NATALIE ANNE TROXEL, DOB: 11/1/89
ISABELLE ROSE TROXEL, DOB: 12/24/91

2.2 BASIS OF JURISDICTION.

This state is the home state of the children because the children lived in Washington with a parent for at least six consecutive months immediately preceding the commencement of this proceeding.

2.3 BEST INTEREST OF THE CHILDREN.

The following facts are deemed in the best interest of the children:

2.3A. The children are the children of Respondent and the Petitioner's deceased son, Brad Troxel.

Findings of Fact and Conclusions of Law

2.3B. Brad Troxel died in May of 1993.

2.3C. The Petitioners brought this action in order to be awarded certain and specific visitation rights with the children.

2.3D. The Petitioners are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music.

2.3E. The court considered the best interests of the children as mandated by RCW 26.09/160 (3). The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' nuclear family. The court finds that the childrens' best interests are served by spending time with their mother and stepfather's other six children.

2.3F The experts did not have an opportunity to interview all parties. They neither interviewed the Troxels nor observed them with their grandchildren.

2.3G Expert Young based her opinion, in part, upon erroneous factual information, specifically the fact that one of the children slept in the bedroom in which the Petitioners' son committed suicide.

2.3H The court viewed a videotape of the children and the Petitioners.

Findings of Fact and Conclusions of Law

2.3I Having this balance in mind, the court finds that the Petitioners should be awarded the following visitation:

1. One weekend per month, starting on Saturday at 4:30 p.m. to Sunday at 6:00 p.m., starting with the month of March, 1994.

2. One Sunday in January and one Sunday in February, starting at 10:00 a.m. and ending at 6:00 p.m.

3. One week in the summer, from Sunday to Sunday, which week will include the weekend above described from that month. The visitation will commence at 10:00 a.m. on the first Sunday and terminate at 6:00 p.m. on the last Sunday. The Petitioners will give thirty (30) days notice of the week that they desire for that visitation. For purposes of this provision, the summer is defined as being from June 15th through September 1st. The Grandparents shall seek the approval of the Mother should they wish to take the children out of the country for an extended visitation. Should the Mother withhold agreement, the parties shall mediate the dispute at Common Ground, Mount Vernon, Washington.

4. Four hours on each of the Petitioners' birthdays, at the Petitioners discretion, not to interfere with the childrens' school hours.

2.3J. The following conditions should apply to the parties and become an order of this court:

1. Respondent should keep the Petitioners apprised of school and extracurricular events, such as school plays, open houses, sports events, performances and recitals, and the like.

2. All parties should assure that the child, Isabelle, is called Isabelle, rather than her middle name "Rose", the former of which is the mother's choice of a name for the child.

3. The parties should confer with regard to answering all questions as to the death of Brad Troxel. Since it is likely that the questions will be put before the Petitioners by the children, the Petitioners should change the subject until a unified approach can be reached as to the answers to give the children.

4. Petitioners or either of them should provide their portion of the transportation for the children, unless there is an emergency, then the Troxel adult children, (defined as the sons, the daughter and the daughters and sons in law) can provide the transportation.

5. The weekend visitation should be held on the second weekend of each moth, PROVIDED HOWEVER, that should this be the weekend with the children's step-siblings, the Wynn children, the

weekend visitation should be the third weekend of each month. In addition, if Petitioner is successful in her intended litigation to obtain weekend visitation for herself with her oldest son, the Petitioners' weekend should the second weekend of each paragraph 5 is met. In any event, the notice should not be less than **ten days**. If the notice is less than ten days, the Petitioners inconvenience and inability to plan will prevail over the rationale of these children spending more time with their step-siblings or half brother and the Petitioners weekend should be the second weekend.

7. The Sunday visitation for the months of January and February of 1995 should continue as under the prior order, i.e., the first weekend of each month.

8. Whether the weekend is defined as the first, second, or third weekend of the months will be defined as follows: A weekend is the first weekend of the month if the 1st day of the month is a Saturday or earlier. The definitions for the subsequent weekends derive from this definition.

9. Responsibility for transportation shall be as follows: The Respondent or anyone at her designation, shall deliver the children at the commencement of the visitation and the Petitioners shall deliver the children at the termination of the visitation, subject to the terms above stated.

2.4 LIMITATIONS ON VISITATION. See paragraph 2.3

2.5 OTHER: NOT APPLICABLE

III. CONCLUSIONS OF LAW

The court makes the following conclusions of law from the foregoing findings of fact:

3.1 The court has jurisdiction over the children.

3.2 DISPOSITION.

The request for visitation in the petition should be granted.

3.3 VISITATION.

Visitation is ordered as detailed in the FINDINGS.

3.4 Other: Both expert opinions should be discounted because of the facts noted in the FINDINGS.

DATED this 3 day of January, 1996.

s/ Michael Rickert
JUDGE MICHAEL RICKERT

Presented by:

s/ Mary H. McIntosh
MARY H. McINTOSH #12744
Attorney for Petitioners

Supreme Court, U.S.
FILED
NOV 12 1999
CLERK

No. 99-138

IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do Washington Revised Code 26.10.160(3) and the former RCW 26.09.240, granting third parties, including grandparents, the right to petition for visitation rights with a minor child if the visitation is "in the best interests of the child," impermissibly interfere with a parent's fundamental interest in the "care, custody and companionship of a child" as defined by the liberty and privacy provision of the United States Constitution?

2. Did the Supreme Court of Washington err in *Custody of Smith*, 137 Wn. 2d 1, 969 P.2d 21 (1998), in holding that Washington Revised Code 26.10.160(3) and the former RCW 26.09.240 are unconstitutional based upon the liberty interest of the Fourteenth Amendment and the fundamental right to privacy inherent in the United States constitution, when it used the flawed premise that a parent's fundamental right to autonomy in child rearing decisions is unassailable and that the state's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set out in the caption. The litigation concerns visitation to Natalie Anne Troxel and Isabelle Rose Troxel, both minors.

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OPINIONS BELOW

The opinion of the Supreme Court of Washington, which is reported at 137 Wn. 2d 1, 969 P. 2d 21 (1998), is reprinted in the appendix to the petition for writ of certiorari ("Pet. App.") at pp. 1a-54a. The order of the Supreme Court of Washington denying petitioners' petition for rehearing, which is not officially reported, is set out at pages 81a-83a of the petition appendix. The decision of the Washington Court of Appeals is reported at 87 Wn. App. 131, 940 P.2d 698 (1997), and is set out at pp. 55a-71a of the petition appendix. The January 1996 Findings of Fact and Conclusions of Law of the Superior Court for Skagit County, which are not officially reported, are set out at J.App. 68a of the petition appendix. The May, 1995 Visitation Decree issued by the Superior Court, which is not officially reported, is set out at pp. 76a-80a of the petition appendix.

JURISDICTION

The decision of the Supreme Court of Washington was issued on December 24, 1998. A timely petition for reconsideration was denied on April 6, 1999. Petitioners filed their petition on July 6, 1999. This Court granted certiorari on September 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

The statutory and constitutional provision involved are reproduced in Appendix E.

STATEMENT OF THE CASE

This case arises out of the desire of petitioners Jenifer and Gary Troxel[1] to remain in contact with their granddaughters Isabelle and Natalie Troxel, now ages seven

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1. Gary Troxel is a longshoreman in Anacortes, Washington, and a long-time member of the musical group, The Fleetwoods. Jenifer Troxel is an accountant. Petitioners have three surviving children, and eight grandchildren.

and nine. Petitioners' state court petition for a visitation order has been opposed by respondent Tommie Wynn[2], the girls' mother. Brad Troxel, the father of the girls and the son of petitioners, died in 1993. The dispute about visitation arose after his death.

Respondent and Brad Troxel, although never married, lived together intermittently from 1988 to 1991. Natalie was born in November 1989 and Isabelle in December 1991. The parents separated permanently in June 1991; they subsequently agreed to a parenting plan, including custody and visitation arrangements, which was filed in state court in 1992. Brad Troxel lived with petitioners after his separation from respondent. Under the parenting plan the girls spent every other weekend with Brad, usually at the home he shared with petitioners. Thus while Brad was alive petitioners met regularly with their granddaughters. (Report of Proceedings ("R.P.") 23).

In May 1993 Brad Troxel committed suicide. For some time thereafter, while respondent dealt with the difficult situation caused by Brad's death, Brad's brother and sister assisted her in caring for the girls. (R.P. 41). Petitioners frequently met with their granddaughters while they were at the home of petitioners' son or daughter. Visitation continued without incident for five months after Brad Troxel's death. In October 1993, however, a disagreement arose between the parties regarding further visitations. (R.P. 31). All visits between petitioners and the girls then ended until April, 1994, when petitioners obtained a temporary visitation order.[3]

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2. At the time this litigation commenced respondent was using the name, Tommie Granville. In 1994 respondent married Kelly Wynn. (Pet. App. 3a). Mr. Wynn is not a party to these proceedings. Respondent has three other children fathered by Jeff Granville, and one child fathered by Kelly Wynn. Mr. Wynn has two children from a prior marriage.

3. The parties disagree as to why no visits occurred during this four month period. *Compare* R.P. 60 *with* R.P. 198.

Respondent ended all telephone contact between petitioners and their granddaughters in February, 1994. (J.App. 54a).

In December, 1993, petitioners filed a petition in Washington state court seeking an order allowing them to visit with their granddaughters. Petitioners relied on RCW 26.10.160(3), which authorizes state judges to order visitation by grandparents or others when it would be in the best interests of the children. By the time the case came to trial, the differences between the parties had narrowed considerably. Respondent voiced no objection to direct regular contact between petitioners and their granddaughters. To the contrary, respondent[4], her attorney[5] and both of her experts[6] all agreed that visitation would be in the best interest of the girls. Respondent's objections were limited to certain aspects of the schedule which petitioners had proposed. For example, although petitioners had requested two weekend-long visits a month, respondent asked that the visits be limited to one afternoon a month. Respondent attempted to show that any overnight visits would be unwise until the girls were older. (J.App. 52a; R.P. 109, 159-60).

The trial was characterized by a laudable absence of acrimony on either side. Petitioners voiced no criticism whatever of respondent's fitness as a mother, and disavowed any animus towards her. (R.P. 28). Jenifer Troxel testified that she understood that respondent preferred that the younger girl be called Isabelle, rather than her middle name Rose — the name that had been used by Brad — and agreed to honor that wish. (R.P. 30). Respondent testified that she had never

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4. Respondent's Pretrial Affidavit, pp. 3-4 ("I have always felt that it was in Natalie and Isabelle's best interest to have a relationship with their paternal grandparents.")

5. J.App. 31a ("[W]e'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured is why we are here. . . .")

6. J.App. 43a, 48a.

experienced any conflict with the petitioners in the presence of the children. (R.P. 193). One of respondent's experts acknowledged that there were no differences between respondent and petitioners regarding discipline, religion, or any other important issue affecting the girls.[7] Although one of respondent's experts suggested that issues might exist about the ability of petitioners to care for the girls, respondent personally disavowed any such suggestion. (J.App. 54a-55a).

In resolving the case, the state trial judge expressly gave considerable weight to respondent's views.

> [T]his is a situation where under the law the dictates of decisions made about children are generally made by the parents and Mrs. Wynn is the natural mother, obviously, of Natalie and Isabelle and should be able to have the ultimate say, to a large degree, as to what happens to those children.

(R.P. 214-15). The judge agreed with both parties that some visitation with petitioners would be in the interests of the girls (R.P. 213); he also concluded, however, that visitation of undue length might interfere with the ability of the girls to spend sufficient time with respondent's four other children and her side of the family, and thus to build a strong relationship with those relatives. (R.P. 214, 217, 220-23). Accordingly, the visitation approved by the judge was significantly more limited than that which petitioners had requested. Although the petition had sought an entire weekend visit every other week, the court only approved a once a month visit from 4:30 p.m. on Saturday until 6 P.M.

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7. R.P. 105-06:

"A. There is a conflict of how frequent to visit.

Q. Any other conflict other than that?

Q. In other words are they conflicted on values or discipline or on anything, religion or do you know of anything else?

A. I don't know of anything else."

on Sunday. (Pet. App. 77a). The judge also denied petitioners' request for visitation on Christmas, Thanksgiving and Easter. The visitation decree included a summer visit of only a single week, half of what petitioners had sought, and short visits during each of the petitioners' birthdays, provisions which respondent had not opposed. (Pet. App. 78a).

In addition, the judge incorporated into the visitation order a number of safeguards to protect the interests of respondent. Petitioners were instructed that they were to call the youngest daughter Isabelle, as respondent preferred. Both parties were directed to avoid comments to the girls about the circumstances of Brad's death until petitioners and respondent had agreed on a joint explanation. Both parties were told to comments critical of the other in the presence of the girls. (Pet. App. 78a-79a).

Respondent, but not petitioners, appealed the judge's order. The specific provisions of that decree to which she objected on appeal was that it permitted the girls to stay at petitioners' home overnight and that it included a summer vacation visit.[8] Respondent also argued that the state law under which petitioners had brought suit did not authorize them to petition for visitation, an issue characterized by the state courts as a lack of "standing." The Washington Court of Appeals initially remanded the case for entry of findings of fact. (J.App. 68a). Thereafter, that court sustained petitioner's statutory argument, holding in light of a 1996 amendment that state law did not authorize petitioners to seek visitation rights. (Pet. App. 57a-63a). At petitioners' request, the Washington Supreme Court granted discretionary review.

In the Washington Supreme Court, this case was heard with two other similar appeals. The state Supreme Court rejected respondent's statutory argument (Pet. App. 5a-12a),

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8. Brief of Appellant, In re The Visitation of Troxel, N. 36737-4-I, pp. 1-10.

but held that the RCW 26.10.160(3) violated the federal Constitution.[9] (Pet. App. 12a-23a). The effect of this decision was not only to overturn the limited portion of the 1995 visitation decree to which respondent had specifically objected, but also to invalidate the decree in its entirety.

Visitations took place without incident from the issuance of the April 1994 temporary visitation order until the end of 1998. The Washington Supreme Court decision was issued on December 24, 1998; since that time petitioners have seen Isabelle Troxel twice and Natalie Troxel only once.[10]

SUMMARY OF ARGUMENT

(1) The court below held that the Washington visitation statute is facially unconstitutional. To sustain such a facial challenge, respondent must show that the statute would be invalid in all or a large fraction of its actual applications. *United States v. Salerno*, 481 U.S. 739 (1987); *Planned Parenthood of Southeastern Pa. v. Casey*, 517 U.S. 1174 (1996).

(2) The lower court erred in assuming that *every* government action which interferes with a "parental decision" is unconstitutional unless justified by a compelling governmental interest. The proper assessment of such a constitutional claim turns on a circumstance-specific analysis of the manner and degree in which an asserted right has in fact been burdened. *Planned Parenthood*, 505 U.S. at 873-84. Heightened constitutional scrutiny is not required where a visitation order or other government action does not significantly burden familial relations.

Visitation orders in favor of grandparents do not, without more, violate a fundamental liberty interest. There is no well

9. The court also held unconstitutional the pre-1996 version of RCW 26.09.240, a provision not at issue in this case.

10. The parties disagree as to why this occurred. A public airing of those differences is not necessary to the resolution of the constitutional issue before this Court, and could complicate relations between the individuals involved.

established legal tradition of refusing such visitation; even prior to modern day legislation, a substantial number of state courts had held that such visitation orders were authorized by the common law. Today statutes in all fifty states specifically empower courts to order visitation on behalf of grandparents.

In a specific case, a party opposing a visitation order, or a decision on any other family law matter, may contend that in the particular circumstances at issue the government's action is unconstitutional. But the possibility of such a fact bound argument does not provide a basis for declaring the statute here facially unconstitutional. *Lehrer v. Davis*, 571 A. 2d 691 (Conn. 1990). There is no showing that all or a large portion of the visitation orders that have issued under the Washington law were unconstitutional.

(3) The determination of whether a government action unconstitutionally burdens a familial interest requires consideration of all of the competing familial interests involved. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The parent-child relationship is not the only constitutionally significant interest at stake in cases such as this. The relationship between a grandchild and grandparent is also an important part of family life. In some instances government action substantially interfering with the grandchild-grandparent relation would be unconstitutional. *Moore v. East Cleveland*, 431 U.S. 494 (1977).

We do not contend that grandparents have a constitutional right to visitation orders. Striking the balance between parent-child and grandchild-grandparent interests involves a difficult assessment of complex and often changing social, familial and personal issues. In general that is a choice for the states to make. *Michael H. v. Gerald D.*, 491 U.S. at 129.

Despite the presence in grandparent visitation disputes of competing familial interests, circumstances could arise

in which a particular visitation order was so intrusive as to violate the fundamental rights of the parent or parents involved. But the possibility of such a fact specific constitutional problem does not render the underlying statute facially unconstitutional.

ARGUMENT

I. INTRODUCTION

A. The History and Application of Grandparent Visitation Statutes

The "regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).[11] In the absence of significant federal constraints, state domestic relations law has changed — and continues to evolve — in complex and nuanced ways. Many of the standards, procedures and issues in state family law today were largely unknown at the turn of the century. Since 1960 there has been a virtual revolution in divorce law, with concomitant changes in custody and support statutes. A new type of state judicial institution, family court, has evolved in some states to deal with these issues in a less formal manner calculated to induce assent rather than merely issue judicial commands. The evolution of family law has been marked by great differences in the approaches taken by the different states. *See Sosna v. Iowa*, 419 U.S. at 405. Unlike, for example, commercial law, where the almost universal adoption of the Uniform Commercial Code has largely conformed state law to a single set of legal standards, the states have consistently balked at adopting proposed uniform legislation regarding

11. *Akenbrandt v. Richards*, 504 U.S. 689, 703 (1992) ("[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the States and not to the laws of the United States") (*quoting In re Burrus*, 136 U.S. 586, 593-94 (1890)).

substantive domestic relations law.[12] Family law emphatically remains an area of state innovation and diversity in response to ever-changing social conditions.

State grandparent visitation statutes are one aspect of evolving family law. The types of problems to which these laws are addressed were far less common when the states first came into existence. In the past, sheer economic necessity often forced, or ethnic tradition induced, grandparents, parents and children to live in the same home.[13] In more recent years, as these circumstances have changed, the nuclear family on which children in the past relied has become less common; "[m]ore varied and complicated family situations arise as divorces, and decisions not to marry, result in single-parent families [and] as remarriages create step-families", making relationships with other family members all the more important. *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478, 481 (1985).

Today legal standards regarding grandparent visitation are largely a matter of statute; in a number of states even before the advent of such legislation, however, courts had held that they had the inherent authority to issue visitation orders in favor of grandparents.[14] Where that practice was already established, state legislation was described as merely codifying existing state caselaw.[15] In other states grandparent visitation statutes were a

12. As of 1999 the Uniform Marriage and Divorce Act had been adopted by only 8 states, the Uniform Adoption Act by 6 states, the Uniform Civil Liability for support Act by 3 states, and the Uniform Marital Property act by a single state. 9A Uniform Laws Annotated, pt. I, pp. 103, 159 (1998); 1999 Supp. pp. 95, 295.

13. On the other hand, if parents chose to move to another state, or even to another county, the cost and delay of travel could make visits with grandparents simply impracticable.

14. *See* n.45, *infra*.

15. *Brooks v. Parkerson*, 454 S.E.2d 769, 779 (Ga. 1995); *Heiss v. Eckert*, 12 Pa. D.&C. 6, 10 (Pa. Cty Ct. 1991); *Soergel v. Raufman*, 154 Wis. 2d 624, 453 N.W.2d 624, 626-27 (1990); *Skeens v. Paterno*, 60 Md. App. 48, 480 A.2d 820, 826 (1984); *Hughes v. Hughes*, 316 Pa.

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significant change in state law.[16] Early legislation was frequently framed to authorize grandparent visitation only in specifically defined circumstances, particularly cases in which one parent had died.[17] Statutes were often broadened as state courts and legislatures discovered unanticipated types of family problems which simply did not fit within the terms of prior laws. In some instances, rather than trying to anticipate and specify which particular types of individuals — such as grandparents or step-parents — might in at least some circumstances be appropriate for visitation, the states simply provided that any person could make such a request. Legislation framed in this manner was not intended to authorize visitation suits by total strangers; so far as we have been able to ascertain, total strangers have not been awarded, or even requested, visitation under these laws.[18] The overwhelming majority of requests and awards under these statutes have in fact involved grandparents.

Grandparent visitation statutes are an area of intense ongoing innovation by the states. The different statutes adopted by the fifty states vary widely. (*See* Appendix A). No less significantly, the states are continually amending their own laws.[19] Washington statutes on this subject have repeatedly been

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Super. 505, 463 A.2d 478, 480 n.1 (1983); *Johnson v. Diesinger*, 589 A.2d 1160, 1161 (Pa. Super. 1961).

16. *Mimkon v. Ford*, 66 N.J. 426, 332 A.2d 199 (1975) (citing cases).

17. *Emanuel S. v. Joseph E.*, 577 N.E.2d 27,28-29 (1991). The New York statute adopted in 1966 appears to have been the first state legislation on this subject. *See* Appendix A.

18. Cf. *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (Pa. Super. 1978) (visitation for stranger will rarely if ever be awarded).

19. *See Beagle v. Beagle*, 678 So. 2d 1271, 1273 (Fla. 1996) (describing amendments to Florida statute); *In re Custody of H.S.H.-K.*, 533 N.W. 2d 419, 425-27 (Wis. 1995) (describing amendments to Wisconsin statute); *Bailey v. Menzie*, 542 N.E.2d 1015, 1017-18 (Ind. App. 3 Dist. 1989) (describing amendments to Indiana statute); *Evans*
(Cont'd)

amended since the first of them was adopted in 1973. (Pet. App. 7a-8a). The states have steadfastly refused to conform to any single standard.

The various state grandparent visitation statutes do have several basic elements in common. They do not confer on grandparents a *right* to visit their grandchildren[20]; grandparents are only authorized to make a request for visitation.[21] That request can be granted only if it is in the best interest of the child; whether or how much visitation might benefit the grandparents is not relevant[22]. The grandparents bear the burden of persuasion on this issue[23]; even where that burden is met, the court still has discretion to deny the request. The states which

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v. Evans, 302 Md. 334, 488 A.2d 157, 159-61 (1985) (describing amendments to Maryland statute); *Brown v. Meekins*, 666 S.W.2d 710, 282 Ark. 186 (Ark. 1984); *Castagno v. Wholean*, 239 Conn. 336, 684 A.2d 1181, 1187-89 (1996) (describing amendments to Connecticut statute).

20. *Sightes v. Barker*, 684 N.E.2d 224, 233 (Ind. App. 1997); *Brooks v. Parkerson*, 454 S.E.2d 769, 779 (Ga. 1995) (dissenting opinion); *Campbell v. Campbell*, 896 P. 2d 635, 643 (Utah App. 1995); *Michael v. Hertzler*, 900 P. 2d 1144, 1146-47 (Wyo. 1995); *Fairbanks v. McCarter*, 622 A.2d 121, 125 (Md. Ct. App. 1993); *Heiss v. Eckert*, 12 Pa. D.&C. 4th 6, 11 (Pa. Cty. Ct. 1991); *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049, 1053 (N.Y. 1981); *Wick v. Wick*, 403 A.2d 115, 116 (Pa. Super. 1979); *cf. Application of Goldfarb*, 6 N.J. Super. 543, 70 A.2d 94, 96 (1949).

21. In the courts below this status was characterized as "standing", using the term in a manner somewhat different from the federal constitutional requirement.

22. "[I]t is primarily 'the right of the child to . . . know her grandparents; which is being protected and not the interests of the grandparents." *Roberts v. Ward*, 493 A.2d 478, 482 (N.H. 1985).

23. *Wolinski v. Brownneller*, 115 Md. App. 285, 693 A.2d 30, 40 (1997); *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997) ("the burden is on the grandparent . . . to demonstrate by a preponderance of the evidence that court-ordered visitation is in the children's best interest."); *Commonwealth ex rel. Zaffarano v. Genaro*, 500 Pa. 256,
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further limit visitation orders to specific identified circumstances usually include among those circumstances the death of the parent who was the child of the requesting grandparents.[24]

In other respects, however, state laws differ widely. Many establish additional general prerequisites that must be met before a visitation request can be granted or even entertained; some states, for example, require that such requests be made in connection with ongoing divorce or custody proceedings, or require a showing of some sort of special circumstances. A number of statutes spell out varying criteria to be used by the state judges in determining whether visitation would be in the best interests of a child. Some states permit visitation requests by persons other than a grandparent; in practice such requests have been infrequent and made either by other relatives or by

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455 A.2d 1180, 1183 (1995) (grandparents "must show reasons to overcome the parent's prima facie right to uninterrupted custody"); *Campbell v. Campbell*, 896 P.2d 635, 643 (Utah App. 1995) ("If the statute gave grandparents an unrestricted vested right of visitation, we would be far more likely to question its constitutionality. But under the existing statutory scheme, a court cannot grant visitation until . . . detailed findings of fact and conclusions of law are entered explicitly demonstrating that the best interests of the children will be served by granting visitation."); *Ridenour v. Ridenour*, 901 P.2d 770, 774 (N.M. App. 1995) ("there is no presumed beneficial relationship between grandparents and grandchildren; rather, visitation is appropriate only after the grandparents have . . . presented evidence to show . . . that visiting is in the child's best interests."); *R.T. v. J.E.*, 277 N.J. Super. 595, 650 A.2d 13, 16 (1994). *Bucci v. Bucci*, 351 Pa. Super. 457, 506 A.2d 438, 339-40 (1986); *Rosemary E.R. v. Michael G.Q.*, 471 A.2d 995, 996 (Del. Super. 1984).

24. According to one recent analysis, twenty state statutes expressly cover cases in which a parent is deceased. Averett, "Grandparent Visitation Right Statutes", 1999 B.Y.U. Journal of Public Law 355, 357-61 (1999); *see Preston v. Mercieri*, 573 A.2d 128, 131 (N.H. 1990) (citing statutes).

individuals who had a substantial role in raising the child in question.[25]

The practical significance of these statutes turns largely on the types of circumstances in which visitation is typically requested and approved. A substantial majority of the several hundred reported cases involve certain common elements. The party seeking visitation is usually one or two grandparents. The child ordinarily is living with only one of its biological parents, and only one of the biological parents is opposing visitation. The biological parent objecting to visitation is generally not the child of the grandparents seeking visitation. In most cases the grandparents at one time had significant contact and relationship with the grandchild in question, but some intervening event — such as the death or absence of the other parent, or personal or financial differences between the grandparents and custodial parent — led to an end to visitation. The disputed issue in litigated cases is most often whether the grandparents will be able to see their grandchildren at all, rather than about the details of an otherwise unopposed request for visitation.

A large number of grandparent visitation requests are made where, as in the instant case, a parent has died, and a dispute about visitation arises between the surviving parent and the parents of the deceased parent; a list of such cases is set out in Appendix B. A similar set of cases concern grandparents related to a parent who is for some reason absent and thus unable to

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25. E.g. Pet. App. 2a (visitation sought by man who lived with biological mother and helped raise her child from age 2 to age 6); *Cox v. Williams*, 177 Wis. 2d 433, 502 N.W.2d 128, 129 (1993)(former stepmother who had helped raise child for five years); *Noonan v. Noonan*, 171 Wis. 2d 706, 492 N.W.2d 172, 173 (1992) (aunt who took care of child during illness and after death of mother); *Hendershot v. Hendershot*, 785 S.W. 2d 34 (1990) (great aunt who cared for her grand nephew for extended periods of time); *D.D.M. v. J.M.*, 137 Wis. 2d 375, 404 N.W.2d 530, 532 (1987) (aunt who had been child's guardian for six years); *Quirk v. Swanson*, 368 N.W.2d 557, 558 (N.D. 1985) (former husband, believing that he was the father of the child, cared for the child for one and one-half years).

provide them with access to their grandchildren. See Appendix C. In many of the other cases, the non-custodial biological parent, usually the son or daughter of the requesting grandparents, seems to have simply abandoned any significant relationship with the child in question.[26] A recurring special situation of particular importance to the child in question arises where the individual making the visitation request was earlier involved in actually raising the child, and may thus in the eyes of the child have filled the role of a parent.[27]

Many cases that have arisen under these statutes present circumstances that are quite unique, if not at times bizarre, posing practical problems that defy categorization or ready constitutional analysis. In *In re Custody of Smith*, 137 Wn. 2d 1, 969 P.2d 21 (1998), the grandparents lost access to their granddaughter when their son was murdered by his mother-in-law in a shoot out during which the mother-in-law also died. (Pet. App. 3a). In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the individual seeking visitation rights claimed to be the biological father of the child at issue, who had been born to the

26. E.g. *Ridenour v. Ridenour*, 901 P. 2d 770, 772 (N.M. App. 1995) (following divorce father with visitation rights "had very little contact with either Child or Grandparents").

27. E.g. *Roberts v. Ward*, 493 A.2d 478, 479 (N.H. 1985):

> The child and her mother lived with [the maternal grandparents] in [their] home for a year and a half after the child's birth April 10, 1974. This living arrangement was terminated by [the mother], following the [grandparent's] objections to their daughter's erratic behavior. The [grandparents] nonetheless maintained regular contact with their grandchild. They cared for her nearly every weekend from 1976 to 1979. They also picked her up from day care and provided her evening meal every day during that period while, they contend, their daughter worked and experimented with various life styles and male companions. From the fall of 1979, when the child began formal schooling, until 1983, the plaintiffs and child visited nearly every weekend.

A list of other such cases is set out in Appendix C.

wife of another man. In *Temple v. Meyer*, 208 Conn. 404, 544 A.2d 629 (1988), visitation was sought by a man who for years had believed he was the father of the child in question, and had raised him as his son, only to learn from a later paternity test that another man was the biological father.

Cases in which a grandparent sought visitation over the objection of the parents in an intact, nuclear family are less common, and such requests are often unsuccessful. A number of decisions have held that generally phrased state statutes were never intended to apply to intact families.[28] In other states, courts have applied a strong presumption against any visitation order in such circumstances.[29] Several state courts have held that their state constitutions ordinarily preclude application of a visitation statute to an intact nuclear family.[30]

Most of the family law matters which come before state courts involve sensitive personal problems; state judges have developed considerable experience and skill in the delicate task of assessing and resolving such disputes. State judges have brought those same abilities to bear on grandparent visitation requests. State courts have agreed that the "best interests of the child" concerns the child's interest in maintaining a familial relationship with the party seeking visitation, *see* p. 42, *infra*, a standard which usually cannot be met if there was no significant prior contact between that party and the child.[31] Those courts have repeatedly recognized

28. *Lingo v. Kelsay*, 651 So. 2d 499 (La. App. 1995); *Welsh v. Welsh*, 21 Pa. D.&C. 4th 246 (1993); *Dietrich v. Dietrich*, 17 Pa. D.&C. 4th 270 (1992); *Herron v. Seizak*, 321 Pa. Super. 1983, 468 A.2d 803 (1983).

29. *Castagno v. Wholean*, 239 Conn. 336, 684 A.2d 1181 (1996); *Steward v. Steward*, 890 P. 2d 777 (Nev. 1995).

30. *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

31. *O'Brien v. O'Brien*, 141 N.H. 435, 684 A.2d 1352, 1354

(Cont'd)

that visitation would not be in a child's interest if it would interfere with his or her relationship with the custodial parent.[32] Thus state judges have held that visitation would be inappropriate where the grandparents were disposed to criticize the parents in front of the grandchildren, or to disregard or undermine the parent's views about how the children should be raised.[33] Even where a child's parents may themselves have been responsible for past differences with the grandparents, courts have refrained from placing the children in a family crossfire.[34] State judges have understood that where visitation is likely to cause substantial emotional distress to a parent, the resulting impact on the child may make visitation inappropriate.[35] On the other hand, state courts have been able to recognize situations in which a parent's denial of visitation was unrelated to any concern for the child, but was instead the result of a collateral

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(1996); *Maner v. Stephenson*, 342 Md. 461, 677 A.2d 560, 562 (1996); *Matter of Rita VV*, 619 N.Y.S.2d 218, 221 (A.D. 1994); *New Jersey Div. Youth & Fam. Serv. v. E.D.*, 233 N.J. Super. 401, 558 A.2d 1377, 1386 (1989); *Hughes v. Hughes*, 316 Pa. Super. 505, 463 A.2d 478, 480 and n.1 (1983).

32. *Beckman v. Boggs*, 337 Md. 688, 655 A.2d 901, 904 (1995); *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121, 127 (1993); *Norris v. Tearney*, 422 Pa. Super. 246, 619 A.2d 339, 342 (1993); *Commonwealth ex rel. Shee v. Holewski*, 316 Pa. Super. 509, 463 A.2d 480, 483 (1983).

33. *Johnson v. Diesinger*, 589 A.2d 1160, 1164 n.7 (Pa. Super. 1991); *Commonwealth ex rel. Zaffarno v. Genaro*, 500 Pa. 256, 455 A.2d 1180, 1184 (1983); *Commonwealth ex rel. Flannery v. Sharp*, 151 Pa. Super. 612, 30 A.2d 810, 811 (1943).

34. *Commonwealth ex rel. Zaffarano v. Genaro*, 500 Pa. 256, 455 A.2d 1180, 1182-85 (1983); *Hughes v. Hughes*, 316 Pa. Super. 505, 463 A.2d 478, 479 (1983); *Commonwealth ex rel. McDonald v. Smith*, 170 Pa. Super. 254, 85 A.2d 686, 688 (1952); *Application of Goldfarb*, 6 N.J. Super. 543, 70 A.2d 94, 95-96 (1949).

35. *Rigler v. Treen*, 660 A.2d 111, 115-16 (Pa. Super. 1995); *Norris v. Tearney*, 422 Pa. Super. 246, 619 A.2d 339, 340-42 (1993).

personal or financial dispute between the grandparents and the custodial parent.[36] Frequently, visitation orders, like the order in this case; contain provisions framed to assure that the visitation does not interfere with the parent-child relationship.[37]

As is true of many family law matters, however, the issuance of a disputed court order is the last, and fortunately a less common, resort. Although Washington first enacted grandparent visitation legislation in 1973, there are only a handful of reported cases in which a parent appealed from a visitation order, and in only a few of these did the parent contend on appeal either that the order was not in the best interests of the child or that the type or amount of visitation approved was inappropriate. Often court-ordered or voluntary mediation results in a settlement of visitation issues. Where a court-appointed expert provides the parties with an objective, psychological evaluation of their differences, that report frequently provides the basis for an agreement. Once litigation has begun, most attorneys attempt to avoid actions by themselves or their clients that would aggravate existing differences. They seek to bridge the differences between parties whose lives are inextricably interconnected because of their shared relationship to the child involved.

As occurred in the instant case, state judges orchestrate their proceedings so as to encourage parties to understand the needs and concerns of one another, and to persuade them to accept in advance part if not all of the order that may be issued. Decisions in these and other domestic relations matters are often

36. *Herndon v. Tuhey*, 857 S.W.2d 203, 205 (Mo. banc 1993); *King v. King*, 828 S.W.2d 630, 631 (Ky. 1990); *Ward v. Ward*, 537 A.2d 1063 (Del. Fam. Ct. 1987); *Thompson v. Vanaman*, 210 N.J. Super. 225, 509 A.2d 304 (1986); *Ritter v. Ritter*, 36 Pa. D.&C. 3d 556, 557 (Pa. Cty Ct. 1985). *Commonwealth ex rel. Miller v. Miller*, 329 Pa. Super. 248, 478 A.2d 451, 452 (1984).

37. *Commonwealth ex rel. Miller v. Miller*, 329 Pa. Super. 248, 478 A.2d 451, 454 (1984); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A.2d 70, 71 (1960).

solomonic in nature, involving a compromise structured to encourage the parties to work together in the future and to heal their family rifts. There are, to be sure, cases in which grandparent visitation requests are vigorously litigated, but these are the exception. Often these statutes lead to a civil, non-coercive resolution, by bringing each party to understand the personal and legal interests of the other and to focus on the interests of the child whom they all love, and through providing a carefully structured judicial forum for resolving past differences.

B. The Constitutional Issue Before the Court

The issue before this Court is not whether grandparent visitation statutes generally are good social policy, or how the particular statute that has been enacted by Washington might be improved. Nor is the Court asked to determine whether the state trial judge in this case erred in concluding that it would be in the best interest of Natalie and Isabelle Troxel to spend at least some time with their paternal grandparents. Although the parties are in disagreement about one aspect of the scope of the visitation order — whether the weekend visits should last overnight — that is a state law matter which remains open for resolution on remand. The only question here is whether the particular course Washington has chosen is unconstitutional.

The specific constitutional issue is a narrow one. The petitioners are not advancing an argument that grandparents have a constitutional right to visit their grandchildren[38]. Neither party is contending that the proceedings through which this case was resolved in the lower courts violated procedural due process. Both parties had ample notice of the proceedings, were represented by counsel, and were able to advance their contentions unencumbered by any presumptions against them.

38. Thus this Court has no occasion to consider, for example, whether it might in some instances be unconstitutional for a state court to enjoin a grandparent from having contact with his or her grandchild. *See Moore v. East Cleveland*, 431 U.S. 494 (1977); *Deweese v. Crawford*, 520 S.W.2d 522, 527 (Civ. App. Tex. 1975) (denying injunction against grandparents).

See Michael H. v. Gerald D., 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The Washington Supreme Court did not rely on, and respondent did not there advance, any circumstance-specific constitutional objection to the application of RCW 26.10.160(3) to this particular case. Respondent has never urged, for example, that visitation would interfere with her ability to determine the religion of the children, to shape their values, or to oversee their education. The court below properly dealt with this case as presenting only a facial challenge to the constitutionality of the Washington statute.

The appropriate constitutional standard for adjudicating a facial challenge to the validity of a statute has occasioned some disagreement within this Court. *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996). *United States v. Salerno*, 481 U.S. 739, 745 (1987), held that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." On the other hand, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992), held a statute facially invalid because it would be unconstitutional in a "large fraction" of the cases to which it applied. *See Washington v. Glucksberg*, 521 U.S. 702, 740 n.6 (1997) (Stevens, J., concurring) (facial challenge must be rejected if the statute has a "plainly legitimate sweep"). Rejection of respondent's facial challenge, of course, would not mean that every application of RCW 26.10.160(3) would necessarily be constitutional.

The Court need not resolve in this case any actual or apparent difference between the standard in *Salerno* and *Casey*. On the interpretation of substantive due process adopted by the court below, RCW 26.10.160(3) would indeed be unconstitutional in *all* cases. The Washington Supreme Court

held that a state visitation order under RCW 26.10.160(3) *always* interferes with the fundamental constitutional rights of the custodial parent, and that the best interests of the child is *never* a constitutionally sufficient justification for such interference. If those premises are indeed correct, the statute would indeed be facially invalid.

We advance a far less categorical approach. Although not every visitation order would interfere with the fundamental rights of a parent, circumstances could conceivably occur in which a particular order would do so. And while ordinarily the best interests of a child, in our view, is constitutionally sufficient to justify a visitation order, cases could arise in which that would not be so. The circumstance-specific nature of any possible constitutional defect in a visitation order under RCW 26.10.160(3), however, is fatal to respondent's facial challenge.

There is no showing that in virtually all or even some of the cases in which the statute has been applied by Washington courts the order in question would be invalid under this case-specific standard. The circumstances that would raise serious constitutional questions may not in fact have arisen in many Washington cases. Even if they were to occur, it is entirely possible — indeed likely — that any serious interference with parent-child relationships would lead Washington courts to conclude, as have courts in other states, that visitation would not be in the best interests of the child.[39] Whatever the difference between *Salerno* and *Casey*, it has never been doubted that a facial challenge cannot be based on "a worst-case analysis." *Ohio v. Akron v. Center for Reproductive Health*, 497 U.S. 502,

39. Possible constitutional problems might also be avoided by the manner in which RCW 26.10.160(3) may be construed by the state courts; prior to its consideration of the instant case, the Washington Supreme Court had never resolved any questions about the correct interpretation of that law. The statute, moreover, is merely permissive; it only allows, but does not require, a court to issue a visitation order where that would be in the best interests of the child. How Washington courts might use that discretion in future cases is at this juncture entirely unforeseeable.

514 (1990). Respondent bears the burden of establishing the facial invalidity of the statute; in the absence of a record regarding actual applications of RCW 26.10.160(3), her facial attack must fail.

The court below appears to have been particularly concerned about the constitutionality of a visitation order regarding a child who is living with his or her married biological parents. (Pet. App. 12a). Absent a showing of the general invalidity required by *Salerno* or *Casey*, however, there would be no occasion to consider the constitutionality of RCW 26.10.160(3) in circumstances other than those of the instant case. An attempt to litigate in this case the validity of a visitation order in other particular circumstances would face insurmountable jurisdictional problems under Article III; no case or controversy exists between the instant parties regarding such a question. Neither petitioners nor respondent have a personal interest in a determination of whether the Constitution would permit a state to order grandparent visitation over the objections of a child's married biological parents; since Brad Troxel is now dead, there is no possibility that any resolution of that constitutional question could affect the validity of a visitation order regarding his two daughters. At this juncture it is impossible to know what constitutional issue, if any, might arise in such cases, in part because the Washington courts have never had occasion to determine how, if at all, RCW 26.10.160(3) would apply to a visitation request resisted by a child's married biological parents.

Although we contend that RCW 26.10.160(3) is facially constitutional, the application of *any* domestic relations law could raise circumstance-specific constitutional questions. The facts presented by particular family law disputes are complex and varied beyond imagination. Any sweeping generalization in this area is likely to be confounded by a case presenting wholly unforeseeable events or actions. In dealing with such matters it is assuredly the case that "the [better] part of wisdom [is] not to attempt, by any general statement, to cover every

possible phase of the subject." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990), *quoting Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897).

II. A PARTY ATTACKING THE CONSTITUTIONALITY OF A VISITATION ORDER MUST DEMONSTRATE THAT GOVERNMENT ACTION HAS SIGNIFICANTLY BURDENED FAMILIAL RELATIONS

The central premise — and flaw — of the decision below was its assumption that strict constitutional scrutiny is triggered by government action which is inconsistent with *any* parental decision regarding his or her child. A compelling governmental interest is required, it reasoned, before "the state may step in and override a decision of a parent." (Pet. App. 15a). Any and all "parental decisions" are subject to this same degree of heightened constitutional protection. (Pet. App. 16a, 17a). Under the opinion of the state court, neither the subject matter nor the purposes of a parental preference are of further constitutional significance. The objecting parent need not prove or even contend that disregarding his or her wishes would have an impact on the manner in which he or she is trying to raise the child; indeed, no explanation whatever need be offered for any such objection. On this view a parent's constitutionally protected liberty interests are implicated whenever the government stands in the way of any decision — whatever its nature or purpose — related to a child.

(1) This Court has long emphasized that the constitutionality of a disputed government action turns in part on the magnitude of its impact on whatever underlying right might be at issue. The plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), applied that approach to the liberty interest involved in abortion.

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. . . . Abortion is similar. . . . Only where state regulation imposes

> an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

505 U.S. at 873-74. "A finding of undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877.

> [N]ot every regulation the State imposes must be measured against the State's compelling interests and examined with strict scrutiny. . . .
>
> The requirement that state interference "infringe substantially" or "heavily burden" a right before heightened scrutiny is applied is not novel in our fundamental rights jurisprudence, or restricted to the abortion context. . . . If the impact of the regulation does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears "some rational relationship to legitimate purposes." . . . Even in the First Amendment context, we have required in some circumstances that state laws "infringe substantially" on protected conduct . . . or that there be "a significant encroachment upon personal liberty."

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461-62 (1983) (O'Connor, J., dissenting).

In *Lyng v. Castillo*, 477 U.S. 635 (1986), this Court upheld a method of allotting food stamps which was based on a statutory definition of "household" that was allegedly overinclusive. The effect of the challenged definition was to reduce the amount of food stamps available to parents, children, and siblings who lived together. In sustaining that statute, the Court emphasized that the law did not "directly and substantially" interfere with or "heavily burden" the fundamental rights of the family involved. 477 U.S. at 638. Similarly, in *Zablocki v. Redhail*,

434 U.S. 374, 386 (1978), the Court made clear that strict scrutiny would not be applied to "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship."

No decision of this Court adopts the extraordinarily sweeping standard proposed by the court below. *Wisconsin v. Yoder*, 406 U.S. 204 (1972), on which that court relied, in fact utilizes a method of constitutional analysis that is far more focused and limited. The respondent in that case objected to sending his 15 year old daughter to school. According to the Washington Supreme Court, any such parental objection would alone have been sufficient to compel Wisconsin to adduce a compelling governmental interest, without regard to why Mr. Yoder opposed secondary education and without reference to Yoder's religious views and practices. But no member of the Court in *Yoder* thought the parent-child relationship sufficient by itself to support the asserted constitutional claim; Yoder's contentions were only colorable, and ultimately successful, because they were rooted, not in a "parental decision," but in his unique religious convictions.

Even with regard to Yoder's Free Exercise claim, the mere assertion of a religion-based opposition to secondary education would not have been sufficient. Mr. Yoder was required to demonstrate that in his case compulsory education "*unduly* burdens the free exercise of religion." 406 U.S. at 220. Constitutional scrutiny of that requirement was triggered because Yoder demonstrated that "[t]he impact of the compulsory-attendance law on [his] practice of the Amish religion is not only severe, but inescapable" and would "gravely endanger if not destroy the free exercise of [his] religious beliefs." 406 U.S. at 218-19.

> Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets. . . . [C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today.

406 U.S. at 218.

Yoder did not, as the court below implied, hold that all parents could withdraw their children from school simply by asserting an unexplained "parental decision" that the children cease further attendance. To the contrary, *Yoder* was expressly based on the unique religious convictions of the parents in that case, beliefs which this Court emphatically distinguished from secular preferences.[40] "[W]here nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts . . . constitutionally in requiring education to age 16." 406 U.S. at 233. "It cannot be overemphasized that we are not dealing with a . . . mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." 406 U.S. at 235.

None of the other decisions of this Court on which the Washington Supreme Court relied held that a state law could be invalidated, or called into question, by a parent's assertion, without more, that he or she preferred that a child not comply with its terms. To the contrary, the government action in question in these cases demonstrably interfered with a specific and vital aspect of the parent-child relationship. The statute struck down

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40. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matter of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

406 U.S. at 215-16. On the view of the court below a parent would not need even to articulate some philosophical objection to education.

in *Pierce v. Society of Sisters*, 268 U.S. 525 (1925), forbade parents from sending their children to private schools; the measure was held to "interfer[e] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. The Society of Sisters was a religious order that operated a Roman Catholic parochial school; "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children." *Wisconsin v. Yoder*, 406 U.S. at 233. The state law at issue in *Meyer v. Nebraska*, 262 U.S. 390 (1923), prohibited the teaching of certain languages, in an "attemp[t] materially to interfere with . . . the power of parents to control the education of their own." 262 U.S. at 401. The legislation was evidently intended to sever a student's connections to foreign lands and cultures, was rooted in the animosities of World War I, 206 U.S. at 402, and had been enforced in a criminal action against an instructor in a Lutheran parochial school who had used a collection of bible stories written in German. 262 U.S. at 396-97. Thus *Meyer* and *Pierce*, like *Yoder*, involved parental control over a specific, exceptionally important aspect of a child's upbringing, one freighted with First Amendment protections.

The other decisions of this Court regarding familial relations have concerned government action that would have severed, often irrevocably, all contact between the parent and child. In *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the state had formally terminated all parental rights of the parents in question over their children. The Court noted in *Santosky* that "the private interest affected is commanding" because the parents were opposing "the irretrievable destruction of their family life." 455 U.S. at 758, 753. In *Lehr v. Robertson*, 463 U.S. 248 (1983), *Quilloin v. Walcott*, 434 U.S. 246 (1978) and *Caban v. Mohammed*, 441 U.S. 380 (1979), the government was seeking to approve the adoption of a child over his father's vehement objections. Justice White noted in *Lehr* that "a formal order of adoption, no less than a formal termination proceeding, operates to permanently terminate parental rights." 434 U.S. at

270 (dissenting opinion). In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), and *Stanley v. Illinois*, 405 U.S. 645 (1972), the petitioners were objecting to the government ordered loss of custody of the children in question, under circumstances in which it was unlikely that custody could be regained; the order opposed by the father in *Stanley* would have amounted to "the dismemberment of his family." 405 U.S. at 658. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the asserted biological father of Victoria D. was denied an opportunity even to visit with his daughter[41]. Because a visitation order, unlike a loss of parental rights, does not affect a parent's ability to make the basic decisions about a child's upbringing, and leaves the child in the physical custody of the parent most of the time, a lesser standard of constitutional justification is required.[42]

Adoption by this Court of the standard proposed by the court below would constitutionalize the entire body of custody and visitation litigation in the fifty states. In virtually every contested custody case, and every dispute about the visitation rights of a non-custodial parent, the court order which resolves the matter thwarts the "parental decision" of the losing parent. If Brad Troxel were still alive and sought, over respondent's objections, to take their daughter to visit petitioners, any judicial resolution of that dispute would necessarily override the "parental decision" of either the mother or the father. As

41. In two decisions this Court upheld denial of any visitation rights to a biological father based on a state court finding that such visits would not be in the best interests of the child. *Michael H.*, 491 U.S. at 135 (Stevens, J., concurring); *Quilloin*, 434 U.S. at 251.

42. *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121, 126 (1993) ("Visitation is a considerably less weighty matter than outright custody of a child, and does not demand the enhanced protections . . . that attend custody awards."); *Roberts v. Ward*, 493 A.2d 478, 482 (N.H. 1985) (" '[G]ranting visitation is a far lesser intrusion, or assertion of control, than is an award of custody" and thus not nearly as invasive of parents' rights."); *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (Pa. Super. 1978) ("an order granting visitation is a far lesser intrusion, or assertion of control, than is an award of custody.")

construed by the Washington Supreme Court, the Constitution forbids virtually any resolution of a traditional custody dispute. An award of custody to one parent against the wishes of the other would violate the constitutional rights of the latter unless the decision was necessary to avoid serious harm to the child; if, as is often the case, the child's physical and emotional health were not at risk, there would be no constitutionally permissible way to resolve the dispute. Even if, as we urge *infra*, a lesser degree of justification would be sufficient, the ability of state courts to deal with the delicate problem of inter-parent custody and visitation disputes would be seriously encumbered, if not paralyzed, if every such case posed a potentially serious constitutional problem.

The sweeping implications of the decision below are highlighted by its insistence that "parents should be the ones to choose whether to expose their children to certain people or ideas." (Pet. App. 22a). One need look no further than the nation's public schools to understand the revolutionary implications of such a constitutional rule. Students spend several thousand hours a year in classrooms being "expose[d] . . . to . . . ideas" selected by their teachers, and at times by their classmates. If parents had a constitutional right to control such matters, any parent would presumptively be entitled to veto the schoolbooks read by or to censor the things said in class to his or her children. The conflicting ideals of the various religious, political or other groups to which parents might adhere would gridlock the educational process. As Justice Jackson recognized, any one set of parents has

> as good a right as [another] to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything objectionable to any of these warring sects or inconsistent with their doctrines, we will leave public education in shreds.

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 235 (1948) (concurring opinion).

This is not a merely hypothetical problem. Parents have in fact sought to assert a constitutional right to control the curriculum taught to their children in public schools. In *Mozert v. Hawkins County Bd. of Education*, 827 F.2d 1058 (6th Cir. 1987), a group of parents waged a four year constitutional attack on their local school board's choice of textbooks. The parents objected not only to references to evolution[43], but also to "feminism," "pacifism," "false views of death," and "biographical material about women who have been recognized for achievements outside their homes." 827 F.2d at 1062-64. Any detailed discussion of religions other than their own, they insisted, had to be accompanied by an official statement that "the other views are incorrect and that the plaintiffs' views are the correct ones." 827 F.2d at 1062, 1064.[44] Plaintiff Mozert insisted that this proclamation of error would also have to be made regarding "the feelings, attitudes and values of other students that contradict the plaintiffs' religious views." 827 F.2d at 1062.

The plaintiffs in *Mozert* grounded their ultimately unsuccessful claims on an assertion that the Free Exercise Clause gave them a right to control the ideas to which their children were exposed. The decision of the court below is not even limited to religion based objections; indeed, that decision departs from established constitutional jurisprudence precisely because it accorded presumptive constitutional protection to any "parental decision," whatever its basis. On that rationale, respondent would be equally entitled to object to the exposure of her children, in the classroom or perhaps even in the school library, to ideas ranging from evolution or the "big bang" theory of cosmology to quadratic equations, the subjunctive tense, or French irregular verbs. A substantial constitutional claim would

43. The plaintiffs' lead witness insisted she found insufficient the fact that the textbooks "contained a disclaimer that evolution is a theory, not a proven scientific fact." 827 F.2d at 1062.

44. One plaintiff insisted that according to her beliefs "it is an 'occult practice' for children to use imagination beyond the limitation of scriptural authority." 827 F.2d at 1062.

arise whenever a mother or father made a "parental decision" that his or her child should not take a particular quiz, wear a school uniform, or stay after school for tardiness. If every parent has a right to control which people their children are exposed to, respondent could bar petitioners from attending a school Grandparents' Day, could veto teacher assignments, and could wield a peremptory challenge over her daughters' classmates. *Cf. Batson v. Kentucky*, 476 U.S. 79 (1986).

(2) The specific parental decision in question here — whether a child should visit with her grandparents — presents a more particularized issue. But no basis exists for concluding that even that decision *always* involves the exercise of a fundamental right.

A parent's asserted prerogative to prevent a child from visiting with his or her grandparents is not "an interest traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). In the nineteenth century few state cases and apparently no state statutes addressed this issue. Since the turn of the century, state court decisions on this issue have been divided; decisions in a significant number of jurisdictions held that visitation orders in favor of grandparents could be issued even without express statutory authorization.[45]

45. *Brooks v. Parkerson*, 454 S.E.2d 769, 779 (Ga. 1995 (dissenting opinion) (citing Georgia cases dating from 1915); *Hughes v. Hughes*, 316 Pa. Super. 505, 463 A.2d 478, 480 and n.1 (1983) (statute codified prior caselaw); *D.D.M. v. J.M.*, 137 Wis. 2d 375, 404 N.W.2d 530, 535 (1987) (statute codified prior caselaw); *Beard v. Hamilton*, 512 So. 2d 1088, 1090, 12 F.L.W. 285 (1987) (statute codified prior caselaw); *Olson v. Olson*, 518 N.W.2d 65, 66 (Minn. 1994) (statute codified prior caselaw); *Hawkins v. Hawkins*, 102 Ill. App. 3d 1037, 1039, 430 N.E. 2d 652, 653 (1981); *Krieg v. Glassburn*, 419 N.E.2d 1015, 1019 (Ind. App. 1981); *Looper v. McManus*, 1978 Okl. Civ. App. 26, 581 P.2d 487 (1978); *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1976); *Boyles v. Boyles*, 14 Ill. App. 3d 602, 603-04, 302 N.E. 2d 199, 201 (1973); *Scranton v. Hutte*, 339 N.Y.S. 2d 708, 711, 40 A.D.2d 296 (1973); *Mirto v. Bodine*, 29 Conn. Sup. 510, 294 A.2d 336, 337 (1972); *Ponsford v. Crute*, 56 Wis. 2d 407, 202 N.W.2d 5 (1972); *Weichman v. Weichman*, 50 Wis. 2d 731, 184 N.W.2d 882 (1971);

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"A long standing common law tradition clearly established the circumstances under which . . . grandparents . . . might be entitled to court ordered visitation with a minor child." *Hawkins v. Hawkins*, 430 N.E. 2d 652, 653 (Ill. App. 1981). Today, statutes in every one of the fifty states authorize grandparent visitation orders in at least some circumstances. *See Washington v. Glucksberg*, 521 U.S. 702, 716 (1997); *Michael H. v. Gerald D.*, 491 U.S. at 125.

Fundamental rights entitled to constitutional protection are not limited to long recognized prerogatives; some issues may not have been addressed by historical traditions simply because the underlying problems did not reach the courts with any frequency in years past. Respondent's argument might find historical support if she could identify a universal, long accepted social tradition that among a child's relatives parents and parents alone make decisions about the children. But there is no evidence that such a tradition existed when the Fourteenth Amendment was adopted, during a time when extended families often lived under the same roof. Today this paradigm may describe decision-making among many families, but certainly not among all. Within some Asian-American communities, a tradition of

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Anonymous v. Anonymous, 50 Misc. 2d 43, 269 N.Y.S.2d 500, 503 (1966); *Kewish v. Brothers*, 181 So. 2d 900 (Ala. 1966); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A. 2d 70, 71 (1960): *McKinney v. Cox*, 18 Ill. App. 2d 609, 153 N.E.2d 98 (1958); *Lucchesi v. Lucchesi*, 330 Ill. App. 506, 510-12, 71 N.E.2d 920, 922 (1947); *Consaul v. Consaul*,63 N.Y.S.2d 688, 691 (1946); *Solomon v. Solomon*, 319 Ill. App. 618, 621-22, 49 N.E.2d 807, 809 (1943); *Maddox v. Maddox*, 174 Md. 470, 199 A. 507 (1938); *Douglas v. Merriman*, 161 S.E. 452, 163 S.C. 210 (1931); *see Lippincott v. Lippincott*, 97 N.J. Eq. 517, 128 A. 254 (1925).

Even following the enactment of recent visitation statutes, state courts have repeatedly held that they retained their inherent authority to order visitation in circumstances outside the scope of the statute. *E.N.O. v. L.M.M.*, 711 N.E. 2d 886, 889-91 (Mass. 1999); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 430-34, 193 Wisc. 2d 649 (1995); *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985);

respect for elders dictates that important family decisions, including decisions about children, be made in consultation with or with deference to grandparents. In many Native American tribes the raising of children remains a shared responsibility of all adults in the household. The views of particular grandparents may be accorded particular weight if the tribal tradition is strongly matriarchal, as among the Navajo, or patriarchal, like the Apache. These groups, of course, constitute a significant portion of the population of Washington today; when the Fourteenth Amendment was adopted in 1868, Native Americans and their traditions still predominated in the Pacific Northwest.

(3) Although neither all parental decisions nor all decisions regarding contact with grandparents necessarily involve a fundamental right, it is certainly possible that some such decisions would implicate such fundamental interests. A parent who wishes to mount a constitutional attack on a visitation order, or on any other government action, must identify some particular, constitutionally important aspect of the parent-child relationship and demonstrate that it has been significantly burdened. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 842-47 (1977). But because the constitutionality of a disputed visitation order "depends upon the intrusiveness of the competing state concern", "[u]ntil the [parents] establish a factual basis for the alleged violation of their constitutional rights, they have not established the predicate conditions for the adjudication of their constitutional claim." *Lehrer v. Davis*, 571 A. 2d 691, 693, 694 (Conn. 1990).

Past decisions of this Court identify a number of aspects of that relationship that are of especial constitutional significance, and which in particular circumstances might be obstructed by a visitation order. Parents make fundamental decisions regarding matters such as education and religion, which shape a child's values and identity. *Meyer v. Nebraska*, 262 U.S. 390 (1923). A visitation order that sent an Amish teenager to spend a month each summer with grandparents who worked in a Las Vegas casino might well be as intrusive as the compulsory education

in *Yoder*. A visitation order which took a child out of his or her parent's home for inordinately long periods would begin to interfere significantly with the parent's ability to spend time with the child, a consequence less severe than but related to a loss of custody.[46] *See Stanley v. Illinois*, 405 U.S. 645 (1972). Government compelled visitation with a grandparent whose own actions undermined the child's personal relationship with his parent or parents would raise similar problems. According visitation to a total stranger, or perhaps a grandparent who by choice had had no prior relationship with the child, could interfere with the privacy of the parents and children. *See Stanley v. Georgia*, 394 U.S. 557 (1969).

But unlike the sweeping per se rule adopted by the court below, these far more focused constitutional claims would entail a fact-bound inquiry into the circumstances of a particular case. Few grandparent visitation cases are likely to present these constitutional issues. Many good faith disputes simply are not of constitutional magnitude.

The specific circumstances of this case fall far short of identifying a specific imperiled constitutionally protected aspect of the parent-child relationship. The decree here authorized several forms of visitation which neither respondent nor her experts asserted were objectionable. Paragraph 3.3(4) granted

46. The usual rule is that visitation of greater length must meet a heavier burden of justification. *Earon v. Earon*, 9 Pa. D. & C. 4th 101, 105 (Pa. Cty. Ct. 1991): *Johnson v. Diesinger*, 589 A.2d 1160, 1164-65 (Pa. Super. 1991); *Sketo v. Brown*, 559 So. 2d 381, 383 (Fla. App. 1 Dist. 1990); *Commonwealth ex rel. Zaffarano v. Genaro*, 500 Pa. 256, 455 A.2d 1180 (1983); *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (1978) ("As the amount of time requested moves the visit further from a visit and closer to custody, the reasons offered in support of the request must become correspondingly more convincing"). Thus application of the best interest standard ordinarily, at least, may solve this problem. ["]Visitation should not be excessive . . . . Our interpretation is based in part on the fact that if the statute allowed a great amount of visitation, we would be more likely to find an undue burden on the family and hold that these sections are unconstitutional." *Herndon v. Tuhey*, 857 S.W.2d 203, 210-11 (Mo. banc 1993).

four hour visits during each of the petitioner's birthdays, and paragraph 1 assured petitioners of notice of events such as school plays and open houses. (Pet. App. 77-78). It is difficult to understand how an order directing respondent to take steps which she did not oppose could somehow violate her fundamental rights.

Respondent did object to that portion of the decree which provided for a monthly overnight visit at petitioners' home. Although the girls had regularly stayed there several years earlier while their father was still alive and living at the home, respondent sought to prove that the girls were too young to be away from their mother's home overnight. The trial judge rejected this contention, in part because respondent's witnesses had never interviewed petitioners and because the contention was based on inaccurate information about petitioners' home. (Pet. App. 74a). This is precisely the sort of dispute that state court judges decide every day; it presents no constitutional issue.

Respondent's attorney did raise in the state Superior Court one issue of constitutional significance. After the trial had been completed and the judge had already issued his ruling, respondent's counsel for the first time in the proceeding raised a question related to religion, asking the judge to forbid petitioners to take the girls to church with them. (R.P. 225). The posture of that issue below, however, was utterly different from the proceedings and record in *Yoder*. Unlike Mr. Yoder, respondent proffered no testimony that her religious views or practices actually differed from those of petitioners, that attending church with their grandparents would affect with the girls' religious upbringing, or that she had ever asked petitioners simply to agree not to take the girls to church. The trial judge rejected on state procedural grounds the requested prohibition, explaining that it was both untimely and not supported by any evidence introduced by respondent at trial (R.P. 226); respondent did not pursue this issue on appeal. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

Even where a colorable constitutional claim is asserted, its resolution — like the analysis in *Yoder* — will depend on a

careful evaluation of the particular circumstances involved. A visitation order involving only a few hours a year, for example,[47] is far less likely to substantially burden any fundamental right of a parent. In some cases constitutional problems that might otherwise have existed may be prevented by including in the visitation order appropriate limitations or safeguards.

In order to support a facial challenge to RCW 26.10.160(3), respondent would have to establish that every, or virtually every visitation order issued pursuant to that statute would substantially burden an identifiable fundamental right. Although it is possible that some visitation orders would impose such burdens, there is no showing that orders of that sort are the norm under RCW 26.10.160(3), or even that they have occurred at all.

III. IN RESOLVING A CLAIM OF IMPERMISSIBLE INTERFERENCE WITH FAMILIAL RELATIONSHIPS, THE COURT MUST CONSIDER THE IMPACT OF THE CHALLENGED ACTION ON ALL AFFECTED FAMILIAL RELATIONSHIPS

(1) Even where a visitation order significantly interfered with a parental right, it would not follow in every case that the order was unconstitutional.[48] This Court has repeatedly

47. E.g. *Campbell v. Campbell*, 896 P.2d 635, 638 n.4 (Utah App. 1995) (grandparents awarded a single four hour monthly visit at which they could see only one of the five grandchildren at issue, plus certain holidays); *Spradling v. Harris*, 778 P. 2d 365, 366 (Kan. App. 1989) (a five hour visit once a month, and one phone call a week); *Bucci v. Bucci*, 351 Pa. Super. 457, 506 A.2d 438 (1986) (a two hour visit on the first Sunday of February, May, September and December); *Boyles v. Boyles*, 14 Ill. App. 3d 602, 302 N.E. 2d 199, 200 (1973) (a summer vacation each year); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A.2d 70, 71 (1960) (a two hour visit every third Saturday).

48. The court below insisted that a state may take actions which interfere with a parent-child relationship only where that action is necessary to protect the health or safety of the child. (Pet. App. 15a, 16a, 18a, 19a-20a). That proposed restriction is for several reasons unsound. (Cont'd)

admonished that in determining whether one individual has a constitutionally protected interest in a familial relationship, consideration must be given to whether recognition of that relationship would adversely effect some other familial relationship.

In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), the petitioners asserted that foster parents were entitled to a hearing before a child in their care was returned to a biological parent. The Court explained that whatever

(Cont'd)

First, states can and do take such actions in order to protect a child's relationship with some other family member. Custody and visitation disputes between separated or divorced parents are usually resolved on the basis of the best interests of the child; issues of harm to the physical and emotional health of the child, fortunately, are frequently absent in such cases.

Second, innumerable aspects of government which serve important purposes unrelated to the health or even the best interests of the child will at times interfere with a parent-child relationship to a degree at least as intrusive as a visitation order. If, for example, a parent is incarcerated for a crime, he or she is likely to have little opportunity to relate to his or her children; in most cases other than domestic abuse, imprisonment is ordered for reasons unrelated to the existence or welfare of the child. Compulsory education removes school-age children from their homes for thousands of hours of each year, separating them from their parents during those periods; the two girls in the instant case spend far more time in school than they would with their grandparents under the disputed visitation order. Education assuredly benefits children in many ways, but a parent's decision to keep his or her child out of school entirely, or for several weeks or months, would not necessarily pose any risk of harm to the physical or emotional health of the child.

Third, the decision below fails to take into consideration the quite substantial differences in the scope and degree of possible intrusiveness of the various forms of visitation orders that a court might approve. The magnitude of the interest needed to justify action infringing on constitutional rights often turns on the degree of the infringement at issue. One provision of the order in the instant case, for example, merely required respondent to notify petitioners of school plays or other activities in which the girls might be involved; the justification needed for such an order would surely be minimal.

constitutionally protected familial rights a foster parent might otherwise have were limited where they conflicted with the familial interests of the parents.

> It is one thing to say that individuals may acquire a liberty interest against arbitrary government interference in the family-like association into which they have freely entered. . . . It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest . . . . Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.

431 U.S. at 846-47.

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court noted that the interest of a biological father in maintaining a familial relationship with his child would often enjoy constitutional protection:

> [w]here, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband in the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.

491 U.S. at 129. Both the biological father and the husband in *Michael H.* could plausibly have asserted they had a liberty interest in the resolution of that case. Regrettably, one of them would unavoidably have to pay a price if the state chose to respect the interest of the other, either

> Michael by being unable to act as father to the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and [his daughter] have established. Our disposition does not choose between these two

"freedoms," but leaves that to the people of California.

491 U.S. at 130.

As *Michael H.* makes clear, the assessment of which individuals have a familial relationship with a child can be a complex one. In that case Gerald D., at least assertedly, was not Victoria's biological father; yet the Court had no doubt that it was appropriate to recognize that Gerald D. had a familial relationship with Victoria, inter alia because he had raised her as his own child. The existence of a constitutionally significant familial interest may depend more on an adult's personal relationship with a child than on a mere biological connection.[49]

In some instances the liberty interest of another family member affected may be so great that a state is constitutionally required to disregard the preferences of a parent. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 476 (1983), minors were forbidden to obtain an abortion without parental approval; that law was framed to give controlling force to a "parental decision" and the liberty interest parents would have in controlling a medical procedure performed on their child. This Court nonetheless ruled the statute unconstitutional because it interfered with the child's own liberty interest in obtaining an abortion; "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be *in her best interests*." 462 U.S. at 439-40 (Emphasis added); *see Bellotti v. Baird*, 443 U.S. 622, 644-48 (1979) (plurality opinion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976). Similarly, *Parham v. J.R.*, 442 U.S. 584 (1978), held that a state could not institutionalize a child based solely on the decisions of his or

49. *Compare Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978) *with E.N.O. v. L.M.M.*, 711 N.E. 2d 886 (Mass. 1999); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. 1996); *In re custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

her parents, but was required, inter alia, to provide a "neutral factfinder" to independently assess the need for confinement.

In a visitation case, the competing constitutional interests will rarely if ever be so compelling as to require the state to order visitation over the objections of a parent. But, as in *Michael H.*, it often will be the case that those other familial interests are of sufficient significance that the decision regarding how to balance the various interests involved is one which the Constitution leaves to the states.

(2) In its analysis of the constitutional claim and rights at stake in this case, the court below referred interchangeably[50] to the rights of a "family"[51], the rights of a child's "parent*s*"[52], and the rights of "*a* parent."[53] Although in some circumstances the differences between these references might be of no practical or legal significance, in this case the distinctions are of controlling importance.

The Washington court's analysis of the familial relationships at issue in this case focused exclusively on the parent-child relation between respondent and her daughters. In common parlance, however, petitioners and their granddaughters would also be described as being part of the same "family", albeit in a somewhat broader sense.[54] Grandparent visitation

50. The paragraph at pet. app. 22a-23a, for example, begins with the statement that "*Parents* have a right to limit visitation of their children with third persons" (emphasis added), then refers to families, and finally closes with a holding that two Washington statutes "impermissibly interfere with *a parent's* fundamental interest in the 'care, custody and companionship of the child.' " (Emphasis added).

51. Pet. App. 12a, 13a, 14a, 15a, 16a.

52. Pet. app. 12a, 13a, 16a, 18a, 22a.

53. Pet. App. 14a, 15a, 17a, 18a, 20a n.4, 21a, 23a.

54 One dictionary notes that the term "family" has several related but distinct usages, including "parents and their children, considered as a group, whether dwelling together or not" and "any group of persons closely related by blood." Webster's College Dictionary, p. 481 (1991).

statutes are grounded on a recognition that grandparents are part of a child's family.[55]

> The legislative determination to allow grandparents . . . the opportunity to demonstrate that they may significantly contribute to the best interest of the child, finds constitutional support . . . in the recognition that "[t]he constitutional concerns are not entirely parental . . . " . . . "[T]he children themselves have constitutionally protectible interests."

Lehrer v. Davis, 571 A.2d 691, 695 (Conn. 1990) (citations omitted).[56] Even vis à vis one's own parents, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution . . . ." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. at 74.

> [T]he day has long passed when the rights of infants to be properly nurtured are subordinate to the strict legal rights of parents or others, in and over them, and they regarded as chattels to be disposed of as if title to them passed like any ordinary property.

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55. *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997) ("Grandparents are members of the extended family whom society recognizes as playing an important role in the lives of their grandchildren, the importance of which has been given added meaning by the legislature's policy judgment, underlying the [grandparent visitation law]"); *Herndon v. Tuhey*, 857 S.W.2d 203, 209 (Mo. Banc 1993) ("the grandparents are members of the extended family whom society has traditionally recognized as playing an important role in the raising of their grandchildren").

56. *See Michael v. Hertzler*, 900 P. 2d 1144, 1150 (Wyo. 1995) ("the right to associate with one's family is identified as a fundamental liberty under the Wyo[ming] Const[itution]. . . . We perceive this interest to be an equivalent fundamental right to that asserted by [the children's adoptive father]. It is available to children and grandparents, as well as parents, and the state has an equal duty to protect the fundamental rights of the grandparents and the children.")

In re Lippincott, 96 N.J. Eq. 260, 124 A. 532, 533 (1924). By the time a child reaches adulthood, the opportunity for developing a relationship with a grandparent may have passed.[57]

The court below believed that the family accorded protection by the Constitution is limited to parents and their children. "The *law's* concept of the family," it assumed, is restricted to parents and children (Pet. App. 22a) (emphasis added); only the parent-child relationship is given "the protective status accorded the family as a societal institution." (Pet. App. 14a). On this view the familial relationship between the grandchildren and their grandparents is constitutionally irrelevant.

The notion that the "family" protected by the Constitution is defined in this narrow manner was expressly rejected two decades ago in *Moore v. East Cleveland*, 431 U.S. 494 (1977). In that case the city of East Cleveland had adopted an ordinance which made it a crime for Inez Moore to live with her two grandchildren. The city sought to defend the validity of that ordinance by insisting that for constitutional purposes only parents and their children constitute a family.

> The city would distinguish the cases based on *Meyer* and *Pierce*. It points out that none of them "gives grandmothers any fundamental rights with respect to grandsons," Brief for Appellee 18, and suggests that any constitutional right to live together as a family extends only to the nuclear family — essentially a couple and their dependent children.

431 U.S. at 500 (plurality opinion). The plurality opinion emphatically rejected

> what the city urges here: cutting off any protection of family rights at the first, convenient, if arbitrary boundary — the boundary of the nuclear family.

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57. *In re Lippincott*, 124 A. at 533 (the child's "grandparents are all advanced in years, and probably none of them can rationally expect to live for a great while longer, certainly not until this boy attains his majority.")

431 U.S. at 502 (plurality opinion).

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.

431 U.S. at 504-05 (plurality opinion) (footnote omitted).[58] In a concurring opinion, Justice Brennan also rejected limiting the constitutional protection accorded to familial relations to parents and children.[59] Justice Stewart, in a dissenting opinion, argued that the Constitution left to the city the decision whether to include or exclude grandparents from the definition of a "family." 431 U.S. at 539. Significantly, however, no member of the Court suggested that East Cleveland was constitutionally *required* to recognize only parents and their children as members of the same family.

The overarching purpose of state grandparent visitation statutes is to protect the familial relations that children have with their grandparents.

> The [Utah] Legislature promulgated [Utah's grandparent visitation statute] to promote intergenerational contact and strengthen the bonds

58. The plurality noted that in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the relative asserting family rights was actually the aunt of the child involved. 431 U.S. at 505 n.15.

59. 431 U.S. at 507 ("East Cleveland may not constitutionally define 'family' as essentially confined to parents and the parents' own children.")

> of the extended family. Modern society has witnessed a general trend toward the disintegration of the nuclear family. Changes in the demographics of domestic relations, the rise in the divorce rate, and the increasing numbers of children born to single parents are but a few of the factors contributing to the destabilization of the traditional nuclear family. Given such circumstances, it is not unreasonable for our legislature to attempt to strengthen intergenerational ties as an alternative or supplementary source of family support for children.

Campbell v. Campbell, 896 P. 2d 635, 643 (Utah App. 1993).[60]

> It must be remembered that grandchildren, too, have the natural right to know their grandparents and that they benefit greatly from that relationship. Grandparents give love unconditionally — without entanglement with authority or discipline, and often without the pressures of other burdensome responsibilities. Children derive a greater sense of worthwhileness from grandparental attention and better see their place in the continuum of family history. Wisdom is imparted that can be attained

60. *Sightes v. Barker*, 684 N.E.2d 224, 231 (Ind. App. 1997) ("the legislature determined that, in modern society, it was essential that some semblance of family and generational contact be preserved. As a result, the legislature designed the [Indiana grandparents visitation] Act to promote intergenerational contact and strengthen the bonds of the extended family"); *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) ("In an era in which society has seen a general disintegration of the family, it is not unreasonable for the General Assembly to attempt to strengthen familial bonds. . . . "[T]he grandparents' visitation statute was an appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increase in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society. . . . [T]he General Assembly determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved." (citation omitted)).

> nowhere else. The benefits derived by a grandchild from the society of his or her grandparents have been touched upon by psychologists and psychiatrists. . . .

Bishop v. Piller, 637 A.2d 976, 978-79 (Pa. 1994).[61] The familial benefits to grandchildren are particularly significant where a parent has died,[62] or where visitation preserves an important

61. *Sightes v. Barker*, 684 N.E.2d 224, 231 (Ind. App. 1997) ("few would dispute that there are benefits to be derived from the establishment of a bond between grandparent and grandchild."); *Heiss v. Eckert*, 12 Pa. D.&C. 6, 10 (Pa. Cty. Ct. 1991); *Mimkon v. Ford*, 66 N.J. 426, 437, 332 A.2d 199, 204-05 (1975) ("It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known."); *Graziano v. Davis*, 50 Ohio App. 2d 83, 361 N.E.2d 525, 530 (1976) ("the breaking down of family life . . . is a symptom and cause of social disorganization. The overall effect on American society has been devastating. The experts now acknowledge that the increase in teenage drug addi[c]tion and alcoholism, the rise of suicide in young people, the high delinquency rate are nationwide problems, and, in many instances, these problems can be traced to a stripped-down model of family living. . . . Few contemporary American families include grandparents, aunts, uncles and cousins — all of whom used to be around like the front porch, to widen the family circle.")

62. *Sightes v. Barker*, 684 N.E.2d 224, 231 (Ind. App. 1997) ("the state has a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved."); *Commonwealth ex rel. Miller v. Miller*, 478 A.2d 451, 455 (Pa. Super. 1984) ("The relationship between a child and his or her grandparents is a special one. When a child loses a natural parent at an early age, this relationship becomes even more special as the grandparents can help to fill the void which exists due to the loss of a parent"); *People ex rel.*

(Cont'd)

pre-existing relationship with the grandparents.[63] Visitation orders are particularly important if there would otherwise be little contact between the child and grandparents.[64]

We do not contend that a child's interest in maintaining a familial relationship with his or her grandparents will always be so significant as to permit the state to override familial interests of the parents which might be affected, or that the

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Sibley v. Sheppard, 429 N.E.2d 1049, 1052 (N.Y. 1981) ("When one or both of the parents have died, the child usually suffers great emotional stress. . . . [T]he Legislature has recognized that . . . the child should not undergo the added burden of being severed from his or her grandparents, who may also provide the natural warmth, interest and support that will alleviate the child's misery."); *Mimkon v. Ford*, 332 A.2d at 205 ("in the unfortunate case of parental separation or death . . . the continuous love and attention of a grandparent may mitigate the feelings of guilt or rejection, which a child may feel at the death of or separation from a parent, and ease the painful transition."); *Preston v. Mercieri*, 573 A.2d 128, 134 (N.H. 1990) ("In a situation such as the present one, where the child's natural parent has died suddenly, the love and commitment of grandparents can be a source of security which lessens the trauma occasioned by the parent's death"); *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985) ("It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family."); *Deweese v. Crawford*, 520 S.W.2d 522, 524 (Tex. Civ. App. 1975) (where father has died visitation with paternal grandparents can "keep their son alive in the minds and hearts of their grandchildren.")

63. E.g. *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A.2d 70, 71 (1960).

64. *Krigg v. Glassburn*, 419 N.E.2d 1015, 1019 (Ind. App. 1981) *citing Commonwealth ex rel. Williams v. Miller*, 254 Pa. Super. 227, 385 A.2d 992, 995 (1978) ("Except under unusual circumstances, no child should be cut off entirely from one side of its family."); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super 1, 159 A.2d 70, 71 (1960) ("we consider it to be almost inhuman to completely isolate the child from his grandparents").

child's interests require a state to do so. Grandparent-grandchild relationships vary greatly; the value to a grandchild of a court-ordered visitation may be insubstantial where there has been no prior contact with the grandparents, or where the child is likely to be adversely affected by conflicts between the grandparents and the parents. If the injury to the familial interests of the parents greatly outweighs the benefits to the child, an order directing a particular type or frequency of visitation, or possibly even any visitation at all, could be unconstitutional.

But that possibility simply is not sufficient to support a purely facial challenge to RCW 26.10.160(3). Respondent bears the burden of establishing that the familial interests of the grandchild and grandparent will almost invariably be too minor to justify *any* visitation order of any length or form. There is nothing in Washington's experience with grandparent visitation orders, or in the experience of the other forty-nine states regarding grandparent visitation statutes, to support such a contention.

(3) A state also acts to further *parental* rights when, following the death of one parent, it intervenes where necessary to insure continued contact between a child and the grandparents on the side of the deceased parent.

If a deceased parent was, during his or her lifetime, providing his or her parents with access to their grandchildren, it would certainly be reasonable for the state to assume that continued visitation with those grandparents would have been the deceased's preference, and to act on that premise. Numerous state laws on matters such as intestate succession proceed on assumptions of this sort; the practice of attempting to place abandoned or orphaned children for adoption by individuals of the same faith as their biological parents has a similar foundation. The grandparent visitation laws that single out grandparents related to a deceased parent are grounded on the entirely reasonable belief that in providing such visitations the state is carrying out the likely wishes of that parent.[65]

65. *Preston v. Mercieri*, 573 A.2d 128, 131 (N.H. 1990) (statutes (Cont'd)

That the state was implementing a parental decision of the decedent would be crystal clear if he or she had left a will expressing such a preference; in reality, however, even those parents who make wills simply do not address such matters, if only because they do not anticipate that differences between their spouse and their own parents may later arise and, in retrospect, render such an expression important.

During the early years of their lives, Natalie and Isabelle Troxel had two parents. Before his death, Brad Troxel palpably wanted his daughters to spend time with their paternal grandparents. If while Brad Troxel was alive respondent had sought to prevent Brad from taking his daughters to see petitioners, insisting that any contact with them violated her "parental decision" that the girls not see those grandparents, a constitutional challenge on that basis would assuredly have failed. Brad Troxel's own familial relation with his daughters, and his "parental decision" to bring about that visitation, would surely have enjoyed the same constitutional status and protection as petitioner's objections. Were Brad Troxel alive today, the Constitution clearly would not afford respondent a right to prevent him from taking his daughters to visit petitioners; as in *Smith* and *Michael H.*, the state of Washington could chose to respect his wishes even in the face of the mother's objections.

In the wake of Brad Troxel's death, respondent does not contend that Brad Troxel, who regularly brought his daughters to stay and visit with their paternal grandparents, would have wanted those visits to end after his death. The question here is whether the Constitution either forbids the state of Washington to continue to respect a parental decision after the parent has died, or prohibits the state from doing so unless that decision

(Cont'd)
authorize grandparent visitation when parent has died because that parent "can no longer ensure continued contact with grandchildren"); *Lucchesi v. Lucchesi*, 71 N.E.2d 920, 922 (Ill. App. 1947) (where father had been killed in action in France during World War II, "a decent respect for the wishes of the dead" supports award of visitation rights to paternal grandparents).

has been embodied in a will or other formal written document. Surely, absent extraordinary circumstances, the states are free to make such choices.

Because visitation orders arising out of the death of a parent constitute a large portion of the applications of grandparent visitation statutes, respondent cannot establish — as she must to support a facial challenge — that almost all applications of the Washington law are unconstitutional.

CONCLUSION

For the above reasons, the decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — VISITATION STATUTES OF THE 50 STATES

Ala. Code § 30-3-4 (Michie 1989)
Enacted 1983; amended 1989.

Alaska Stat. § 25.24.150 (Michie 1991)
Enacted 1968.

Ariz. Rev. Stat. § 25-409 (West 1998 Supp.)
Added by Laws 1985; amended 1988, 1997.

Ark. Stat. § 9-13-103 (Michie 1998)
Enacted 1985; amended 1993, 1995.

Cal. Civil Code § 3101-3104 (West 1994, 1998 Supp.)
Enacted 1982, 1967, 1993, 1993 respectively; amended 1983, 1988, 1993, 1994.

Colo. Rev. Stat. § 19-1-117 (West 1999)
Enacted 1987; amended 1991, 1993, 1999.

Con. Gen. Stat. § 46b-90 (West 1995)
Enacted 1978; amended 1979, 1983.

Del. Code § 1031(7) (Michie 1998 Supp.)
Enacted 1976; amended 1986, 1994.

Fla. Stat. § 752.01 (West 1997, 1999 Supp.)
Enacted 1978; amended 1984, 1990, 1993.

Ga. Code § 19-7-3 (Michie 1993)
Enacted 1976; amended 1980, 1986, 1988, 1990, 1993, 1996.

Appendix A

Haw. Rev. Stat. § 571-46.3 (Lexis 1998 Supp.)
Enacted 1993; amended 1998.

Idaho § 32-719 (Michie 1996)
Enacted 1994.

Ill. Rev. Stat. § 755:5/11-7.1 (West 1992)
Enacted 1977; amended 1985, 1989, 1999.
Ill. Rev. Stat. § 750:5/607 (West Supp. 1999)
Enacted 1977; amended 1979, 1989, 1991, 1993, 1996, 1998, 1999.

Ind. Code § 31-17-5-1 (Michie 1997, Supp. 1997)
Enacted 1981; amended 1997.

Iowa Code § 598.35 (West 1996, 1999 Supp.)
Enacted 1974; amended 1987, 1996, 1997, 1998.

Kan. Stat. § 38-129 (State 1994)
Enacted 1971; amended 1982, 1984.

Ky. Rev. Stat. § 405.021 (Baldwin 1998)
Enacted 1976; amended 1984, 1994, 1996.

La. Rev. Stat. § 344 (1999 Supp. West)
Reenacted 1993; amended 1994.

Ma. Rev. Stat. § 1803 (West 1998)
Enacted 1991; amended 1993, 1995.

Md. Code § 9-102 (Michie 1999)
Enacted 1984; amended 1991.

Appendix A

Mass. Ann. Laws ch. 119, § 39D (Michie 1994, Lexis 1998 Supp.)
Enacted 1972; amended 1982, 1991.

Mich. Comp. Laws § 722.27b (West 1993, West 1991 Supp.)
Enacted 1982; amended 1996.

Minn. Stat. § 257.022 (West 1998, West Supp. 1999)
Enacted 1976; amended 1977, 1988, 1989, 1993, 1997, 1998.

Miss. Code § 93-16-3 (West 1999, West 1999 Supp.)
Enacted 1983; amended 1986, 1990, 1992.

Mo. Ann. § 452.402 (West 1999 Supp.)
Enacted 1977; amended 1984, 1998.

Mont. Code § 40-9-102 (State 1997, 1998, 1999)
Enacted 1979; amended 1983, 1991, 1995, 1997.

Neb. Rev. Stat. § 43-1802 (State 1995, Supp. 1998 Lexis)
Enacted 1986.

Nev. Rev. Stat. § 125A.330-340 (State 1997)
Enacted 1979; amended 1985, 1987, 1991.

N.H. Rev. Stat. § 458:17-d (State 1992, 1998 Supp. Lexis)
Enacted 1989; amended 1994.

N.J. Stat. § 9.2-7.1 (West 1993, 1999 Supp. West)
Enacted 1971; amended 1973, 1987, 1993.

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N.M. Stat. § 40-9-2 (Michie 1999)
Enacted 1978; amended 1993, 1999.

N.Y. Dom Rel. Law § 72 (West 1988, 1999 Supp. West)
Enacted 1966; amended 1975, 1986.

N.C. Gen. Stat. § 50-13.2 (Michie 1999)
Enacted 1957; amended 1967, 1977, 1979, 1981, 1985.

N.D. Cent. Code § 14.09-05.1 (Michie 1997)
Enacted 1983; amended 1993.

Ohio Rev. Code § 3109.051(B) (1998 Supp.)
Enacted 1990; amended 1991, 1996.
Ohio Rev. Code § 3109.12 (Andersen 1996)
Enacted 1990; amended 1991, 1996, 1998.

Okl. Stat. § 7505-5 (West 1998)
Enacted 1971; amended 1975, 1978, 1981, 1984, 1989, 1990, 1996, 1997.

Ore. Rev. Stat. § 109.121 (Butterworth 1990, State 1997, 1998 Supp. Lexis)
Enacted 1979; amended 1983, 1987, 1993.

Penn. Cons. Stat. § 5311 to 5314 (West 1991, 1999 Supp. West)
Enacted 1981; amended 1985.

R.I. Gen. Laws § 15-5-24.1 (Michie 1996)
Enacted 1980.

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S.C. Code 20-7-420(33) (Law. Coop 1985, 1998 Supp. West)
Enacted 1988; amended 1990, 1992, 1994, 1993, 1996, 1997, 1998.

S.D. Code § 25-4-52 (Lexis 1999)
Enacted 1988.

Tenn. Code § 36-6-302, 306 (Michie 1996, 1998 Supp. Lexis)
Enacted 1971; amended 1975, 1985, 1995, 1997.

Tex. Family Code § 153.433 (Vernon 1996, 1999 Supp. West)
Enacted 1995; amended 1997.

Utah Code § 30-5-2 (Lexis 1998)
Enacted 1977; amended 1993, 1995, 1998.

Vt. Stat. § 15:1011
Enacted 1984.
Vt. Stat. § 15:1012
Enacted 1984.

Va. Code § 20-124.1 (Michie 1999 Supp.)
Enacted 1994.

Wash. Rev. Code § 26.10.160(3) (West 1997, West Supp. 1999)
Enacted 1973; amended 1977, 1987, 1996.

W. Va. Code § 418-2B-4 (Michie 1998)
Enacted 1998.

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Wisc. Stat. § 880-155 (West 1993, 1998 Supp. West)
Enacted 1975; amended 1995.

Wisc. Stat. § 767.245 (1999 West Supp.)
Enacted 1995.

Wy. Stat. § 20-7-101 (Lexis 1999)
Enacted 1991.

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Bailey v. Menzie, 542 N.E.2d 1015 (Ind. App. 3 Dist. 1989) (deceased mother)

Barry v. Barry, 598 S.W.2d 574 (Mo. App. 1980) (father deceased)

Beard v. Hamilton, 512 So. 2d 1088 Fla. App. 1987) (deceased mother)

Beckman v. Boggs, 337 Md. 688, 655 A.2d 901 (1995) (deceased mother)

Bert v. Bert, 397 N.W.2d 270 (Mich. App. 1986) (deceased father)

Bikos v. Nobliski, 276 N.W.2d 541 (Mich. App. 1979) (deceased mother)

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Bust v. Buckler, 530 N.W.2d 630 (Neb. 1995) (mother and father deceased)

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Commonwealth ex rel. Fetters v. Albright, 405 A.2d 1260 (Pa. Super. 1979) (deceased mother)

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Commonwealth ex rel. Goodman v. Dratch, 192 Pa. Super. 1, 159 A.2d 70 (1960) (deceased mother)

Commonwealth ex rel. Miller v. Miller, 329 Pa. Super. 248, 478 A.2d 451 (1984) (deceased father)

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Commonwealth ex rel. McDonald v. Smith, 170 Pa. Super. 254, 85 A.2d 686 (1952) (child and other lived with maternal grandparents for two years)

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In re Adoption of Berman, 118 Cal. Rptr. 804 (1975) (grandmother helped raise child for two years)

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APPENDIX E — STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

Section 26.10.160(3) of the Revised Code of Washington ("RCW"), provides:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

RCW 26.09.240, prior to 1996, provided:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

As amended in 1996, RCW 26.09.240 now provides:

> (1) A person other than a parent may petition the court for visitation with a child at any time or may intervene in a pending dissolution, legal separation, or modification of parenting plan proceeding. A person other than a parent may not petition for visitation under this section unless the child's parent or parents have commenced an action under this chapter.

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(2) A petition for visitation with a child by a person other than a parent must be filed in the county in which the child resides.

(3) A petition for visitation or a motion to intervene pursuant to this section shall be dismissed unless the petitioner or intervenor can demonstrate by clear and convincing evidence that a significant relationship exists with the child with whom visitation is sought. If the petition or motion is dismissed for failure to establish the existence of a significant relationship, the petitioner or intervenor shall be ordered to pay reasonable attorney's fees and costs to the parent, parents, other custodian, or representative of the child who responds to this petition or motion.

(4) The court may order visitation between the petitioner or intervenor and the child between whom a significant relationship exists upon a finding supported by the evidence that the visitation is in the child's best interests.

(5)(a) Visitation with a grandparent shall be presumed to be in the child's best interests when a significant relationship has been shown to exist. This presumption may be rebutted by a preponderance of evidence showing that visitation would endanger the child's physical, mental, or emotional health.

(b) If the court finds that reasonable visitation by a grandparent would be in the child's best interest

Appendix E

except for hostilities that exist between the grandparent and one or both of the parents or person with whom the child lives, the court may set the matter for mediation under RCW 26.09.015.

(6) The court may consider the following factors when making a determination of the child's best interests:

(a) The strength of the relationship between the child and the petitioner;

(b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;

(c) The nature and reason for either parent's objection to granting the petitioner visitation;

(d) The effect that granting visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

(e) The residential time sharing arrangements between the parents;

(f) The good faith of the petitioner;

(g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and

(h) Any other factor relevant to the child's best interest.

(7) The restrictions of RCW 26.09.191 that apply to parents shall be applied to a petitioner or intervenor who is not a parent. The nature and extent of visitation, subject to these restrictions, is in the discretion of the court.

(8) The court may order an investigation and report concerning the proposed visitation or may appoint a guardian ad litem as provided in RCW 26.09.220.

(9) Visitation granted pursuant to this section shall be incorporated into the parenting plan for the child.

(10) The court may modify or terminate visitation rights granted pursuant to this section in any subsequent modification action upon a showing that the visitation is no longer in the best interest of the child.

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "nor shall any State deprive any person of life, liberty or property, without due process of law."

DEC 13 1999

(10)

No. 99-138

Supreme Court, U.S.
FILED
DEC 13 1999
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors.
JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR RESPONDENTS

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the State may order visitation with "any person" "at any time," without proof that an indisputably fit custodial parent is not acting in her child's best interest, based on the standardless exercise of a judge's discretion.

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STATUTORY PROVISIONS INVOLVED

The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

A person other than a parent may petition the court for visitation rights at any time.

The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

Former RCW 26.09.240.

Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

RCW 26.10.160(3).

STATEMENT OF THE CASE

Petitioners ask this Court to overturn the Washington Supreme Court's interpretation of Washington legislation without discussing a single Washington case or a single Washington statute. This statement first explains the law that governs child custody and visitation in Washington. It then sets out the facts of this and the other two cases that the court considered below. Only with these facts in mind can this Court appreciate why the Washington Supreme Court struck down Washington's third party visitation statutes.

A. The Statutes And Case Law Governing Third Party Visitation Actions In Washington.

1. The Third Party Visitation Statutes Predate The Washington Parenting Act.

The regulation of domestic relations in Washington is wholly statutory. *Goade v. Goade*, 20 Wn.2d 19, 145 P.2d 886, 887 (1944). The third party visitation statutes at issue in this case, RCW 26.10.160 and former RCW 26.09.240, were originally enacted as part of the Dissolution Act of 1973. Thirteen years ago, the Washington Legislature profoundly altered the law governing custody of children. In the Parenting Act of 1987, Washington abandoned the concept of custody and visitation and adopted the principle of parenting plans. Under the Washington parenting plan scheme, the parent's residential time with the children is determined by weighing seven enumerated factors to encourage a "loving, stable, and nurturing relationship." RCW 26.09.187(3)(a). Decisionmaking is separately allocated, and does not depend upon with which parent the child primarily resides, as the parents often jointly make decisions concerning education, health care, religious training, and other major issues. RCW 26.09.184(4). The Parenting Act applies to unmarried parents pursuant to RCW 26.26.130(7).

The Washington Parenting Act is based on the concept that parents should retain maximum autonomy in childrearing even though the adults' relationship has ended:

> Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children . . . . The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child . . .

RCW 26.09.002. Under the Parenting Act, state-imposed restrictions on a parent's conduct are authorized only under limited, expressly enumerated circumstances, when the detrimental effect of the parents' conduct on the child has been proved by the party seeking the restriction. RCW 26.09.191. Washington has been especially careful to limit the courts' authority to dictate a parent's behavior when constitutional interests may be implicated. *See, e.g., Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 136 (1997).

One of the statutes at issue here, RCW 26.09.240, was extensively revised in 1996. Wash. Laws 1996, ch. 177, §1. The statute was amended to allow consideration of a petition for third party visitation only if an action concerning the parenting of children is pending between parents. RCW 26.09.240(1). Under the new statute, a petitioner must as an initial matter prove by clear and convincing evidence a "significant relationship" with the child. RCW 26.09.240(3). The statute then sets out eight factors to be examined in considering a request for third party visitation, provides for mediation in certain circumstances, and requires that any third party visitation provisions be incorporated into the parenting plan. RCW 26.09.240(5)(b),(6),(9).

The language of this new statute is reproduced in Appendix E to petitioners' brief. The brief of the Washington Attorney General and others as amici is directed to this statute. However, the Washington Supreme Court's decision at issue here does not address the application of this new statute, as each of the cases before it arose under former RCW 26.09.240 or under RCW 26.10.160(3).

Petitioners allude to the wisdom of family courts in "orchestrating" "non-coercive resolution" of third party visitation disputes with the aid of a court-appointed expert or

institutionalized mediation.[1] (Pet. Br. at 17-18) This characterization does not reflect the reality in Washington state. As an example, there is no specialized "family court" in Washington state. Domestic relations disputes are handled by the county superior courts of general jurisdiction, along with felonies, contract and tort disputes for amounts exceeding $3,000, and claims for equitable relief. Wash. Const. Art. 4, § 6; RCW 26.12.010. Moreover, as in this case, most domestic relations motions are heard not by judges, but by court commissioners - private attorneys retained at the will of the elected superior court judges of the county - on the basis of affidavits submitted by the opposing parties and 5- to 10-minute arguments by their attorneys. *See* RCW 26.12.050(1)(a), (3). And although the investigative and advisory services offered up by petitioners as palliatives for adversarial proceedings are available, at a price, access is hardly automatic, and is extremely limited in many of the smaller counties of the state, such as the county where this dispute arose. Office of Attorney General of Washington, *Alternative Dispute Resolution in Washington* (1999). (RA 31-42)

2. Washington Courts Consistently Interpreted Third Party Visitation Statutes To Apply Only When There Was A Pending Action For Custody.

When the Parenting Act was enacted in 1987, "the law relating to third-party actions involving custody of minor children" was re-enacted and codified in RCW ch. 26.10. RCW

[1] Petitioners' use of the word "solomonic" in their idyllic characterization of the role of family courts in third party visitation litigation is particularly inapt. King Solomon did not "split the baby" to accommodate the claim of the petitioning non-parent, whose own son had died. Instead, King Solomon acknowledged the true mother's right to the exclusive care of her infant. 1 Kings 3:16-28.

26.10.010. Third party visitation language was incorporated in both former RCW 26.09.240 and in subsection (3) of new RCW 26.10.160. In their reference to "visitation," the statutes became in some ways an anachronism. The vestige was of little consequence, however, as the Washington courts had consistently interpreted the statute to require the existence of a pending custody action before visitation with third parties could be ordered. *See, e.g., Custody of B.S.Z.-S.*, 74 Wn. App. 727, 875 P.2d 693, 696 (1994) ("In contrast to other jurisdictions, Washington does not statutorily recognize the rights of grandparents to visitation . . .").

The Washington courts had first held that grandparents had no standing to bring an independent visitation action three years after the original enactment of the third party visitation statute, in *Carlson v. Carlson*, 16 Wn. App. 595, 558 P.2d 836 (1976). The *Carlson* court also rejected the grandparent's claim to a common law "right" to visitation. 558 P.2d at 837. The *Carlson* court relied on five policy considerations:

> (1) Ordinarily the parent's obligation to allow the grandparent to visit the child is moral, and not legal.
>
> (2) The judicial enforcement of grandparent visitation rights would divide proper parental authority, thereby hindering it.
>
> (3) The best interests of the child are not furthered by forcing the child into the midst of a conflict of authority and ill feelings between the parent and grandparent.
>
> (4) Where there is a conflict as between grandparent and parent, the parent alone should be the judge, without having to account to anyone for the motives in denying the grandparent visitation.

> (5) The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention.

Carlson, 558 P.2d at 837-38.

Over the next 20 years, the Washington courts continued to rebuff any attempt to use the statute to justify independent third party visitation actions. *Custody of Thompson*, 34 Wn. App. 643, 663 P.2d 164, 166 (1983); *Mitchell v. Doe*, 41 Wn. App. 846, 706 P.2d 1100, 1102 (1985); *Bond v. Yount*, 47 Wn. App. 181, 734 P.2d 39 (1987). In the face of these limitations, the Legislature and the citizens of the state of Washington consistently refused to enact legislation giving grandparents a special statutory basis for an independent visitation action. For instance, legislation proposed in 1982 would have created a presumption that visitation with a grandparent should be ordered and allowed a grandparent to petition for visitation on the death of a child's parent. House Bill 1049, 48th Legis. (Wash. 1982) (RA 4). The bill died in committee. *See Custody of Thompson*, 663 P.2d at 166 n.3. A bill and an initiative to the people that would have created special independent visitation rights for grandparents failed in 1997. House Bill 1973, 55th Legis. (Wash. 1997); Initiative 672 (RA 6-8). *See Visitation of Troxel*, 87 Wn. App. 131, 940 P.2d 698, 701 (1997) (Grosse, J., concurring).

3. The Washington Supreme Court's Decision Was Based On The Statutes' Application In The Three Cases Before It.

It was in the context of this statutory and case law that the Washington Supreme Court declared that the third party visitation statutes at issue in this case were unconstitutional as

applied in *Smith*, *Troxel*, and *Wolcott* - the three consolidated cases before the Court.[2]

The petitioners' assumption that the "court below properly dealt with this case as presenting only a facial challenge to the constitutionality of the Washington statute" (Pet. Br. at 19) is not supported by the record. The parents whose cases were before the Washington Supreme Court sought to maintain the requirement that there be a custody action pending before a third party could seek visitation. (*Smith* App. Br. at 8-13; *Troxel* Ans. at 7-10) The parents also argued that, in order to protect their interests in parental autonomy from undue state interference, and consistent with state case law governing other restrictions on a parent's conduct, the state court should require a showing of harm or detriment to a child before third party visitation could be ordered by a court. (*Smith* Rep. at 10-11; *Troxel* Ans. at 6, 17)

The parents argued that once the statutes were interpreted in this manner, the visitation orders entered in *Troxel* and *Smith* must be reversed and the dismissal of the *Wolcott* action must be affirmed because *in these specific cases* (1) there was no pending action, and (2) there was no finding that the parent was not acting in the child's best interest as the Washington Supreme Court interprets that term in this context.

The Washington Supreme Court determined that it could not construe the plain language of the statutes as the parents urged. (Pet. 11a) But the Court agreed that a parent's liberty interest in making decisions concerning her child's upbringing may not be infringed absent a showing of harm - that is, a showing that the parent is *not* in fact acting in the child's best interest. (Pet. 21a) It therefore held that the action in *Wolcott*

---

[2] *Custody of Smith*, No. 66207-0; *Visitation of Wolcott*, No. 65699-1; *Troxel v. Granville*, No. 65605-3.

was properly dismissed and that the visitation orders in *Troxel* and *Smith* must be reversed.

The facts in each of these cases provide further understanding of the reasons for the Washington Supreme Court's decision:

B. *Troxel v. Granville.*

1. Tommie Granville Asked The Troxels To Limit Their Visits To Once A Month.

Brad Troxel and Tommie Granville lived together sporadically beginning in January 1989. Tommie was recently separated, and the primary caregiver of three children born of her marriage. Tommie bore Brad's daughter, Natalie, on November 1, 1989. Tommie broke up with Brad in June 1991, when she was three months pregnant with their second child, Isabelle Rose Troxel, born on December 24, 1991. (CP 34)[3]

It is undisputed Tommie was the primary caregiver for the children. The parties dispute how often Brad saw the children while he was alive. Brad's parents undoubtedly had some contact with the children, as Brad was living in their home when he committed suicide on May 13, 1993. (CP 34)

For several weeks after his death, Brad's siblings provided daycare once a week while Tommie was at work. (RP 41-42;

[3] References to the record before the Washington Supreme Court follow Washington citation practice. References to pleadings contained in the Clerk's Papers are cited CP __. References to transcribed reports of proceedings in open court are cited RP __. Citations are also provided to materials contained in the appendices before this Court in the Petition for Writ of Certiorari (Pet. __), Joint Appendix (JA __), and Lodged Appendix of Respondent (RA __).

CP 74-75) Although she had had no direct contact with Brad's parents, Gary and Jenifer Troxel, since Brad's death, Tommie became aware that they were seeing the girls while Brad's sister cared for them. She encouraged Brad's sister to tell his parents that they were welcome to visit with Natalie and Isabelle. (CP 34)

As the summer advanced Tommie became concerned about the Troxel family's increasing, spur-of-the-moment requests to see Natalie and Isabelle. In October 1993, Tommie spoke with Jenifer Troxel. Tommie asked the Troxels to respect her efforts to nurture her new blended family with Kelly Wynn, a local business owner with two children from a previous marriage. Tommie suggested that the Troxels see Natalie and Isabelle one weekend day a month. Tommie proposed that Jenifer arrange contact with the rest of the Troxel extended family during those visits. (CP 34-35, 98)

Tommie proposed this schedule as a starting point, until Kelly and she had the opportunity to stabilize their new blended family. Tommie never acted to cut off access to the girls by the Troxels, nor did Tommie suggest in any way that she would. (CP 35-36)

2. The Troxels Sued Tommie, Demanding Court-Ordered Overnight Visitation Twice A Month.

Jenifer and Gary Troxel were unhappy with Tommie's decision. The Troxels sued Tommie in Skagit County Superior Court, seeking overnight visits "every other weekend, reasonable time on holidays and school vacations, especially Thanksgiving weekend, the Christmas holidays, Easter weekend and summer vacation time." (CP 5)

The Troxels' motion for court-ordered visitation pending trial was heard on a family law motions calendar. In her

responsive affidavits, Tommie explained that she did not want to eliminate contact with the Troxels, but that she was concerned that the Troxels saw Natalie and Isabelle as a "substitute" for their son Brad. (CP 21-23) A court commissioner ordered that the Troxels have visitation once a month pending trial. (JA 21a) Through 1994, the Wynns continued to provide visitation to the Troxels whenever they asked. These visits with Natalie and Isabelle, then ages 2 and 4, were without parental supervision.

Natalie in particular was often upset after her time with the Troxels. (CP 82-84) Nevertheless, as their lawsuit approached trial in December 1994, the Troxels continued to seek biweekly, overnight visitation and extended summer and holiday vacation time with the toddlers. (CP 54-56)

3. The Superior Court Ordered Visitation And Directed Tommie To Consult With The Troxels.

A trial was held in December 1994. As she wanted, if possible, to allow her children by Brad to maintain a relationship with the Troxel family, Tommie was reluctant to raise all her concerns regarding the Troxels. But Tommie continued to resist being ordered to provide visits. Tommie described her blended extended family to the judge.[4] (RP 194-96, JA 57a-59a) Two therapists who had observed the girls testified that the visitation requested by the Troxels in their petition could be harmful to the children. (RP 88-90, JA 40a-42a; RP 141-42)

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[4] Kelly Wynn adopted Natalie and Isabelle on October 28, 1996. (CP 132-37; JA 60a-67a) The Wynns now have eight children. Tommie and Kelly's daughter was seven months old at the time of trial. (RP 194; JA 57a) She is now five. Natalie is ten and Isabelle will be eight when this case is considered by the Court. Besides the Troxels, Tommie identified four sets of grandparents, with whom the Wynns maintained monthly contact. (RP 196; JA 59a)

The judge announced his decision immediately. There is no indication in the court's oral ruling, or in either of the implementation orders, that he believed the Troxels to have any particular burden in establishing the children's best interests: "I think it would be in the best interest of the children and I haven't been shown it is not in the best interest of the children." (RP 214) The judge simply expressed, and entered an order imposing, his view that visitation once a month would be in the children's interests. Unlike the toddlers' mother, the judge believed overnight visits were appropriate. He consequently ordered that visitation be from Saturday at 4:30 p.m. until Sunday at 6:00 p.m. (RP 218)

The Troxels' attorney prepared a visitation order incorporating the court's oral decision. Although it recites that findings of fact and conclusions of law had been entered, the order was not in fact supported by any findings or conclusions. (CP 124, Pet. 77a) In addition to the visitation ordered in the court's oral opinion, the order required Tommie to provide the Troxels with notice of the girls' school and extra-curricular events, and to consult with the Troxels before discussing with her children the circumstances of their biological father's death. (CP 125, Pet. 78a)

Orders providing for visitation or residential time with a child have serious consequences in Washington state. Violation of this order could have subjected Tommie Granville Wynn to sanctions for contempt, including the possibility of coercive or punitive jail time, and to a civil action for damages, including fees incurred for attorneys and "investigative services." RCW 26.09.160(2)(a), .255; RCW 26.10.180. Violation of an order entered under these statutes can be prosecuted as a felony. RCW 9A.40.060(2)(a), .070(2),(3).

Given their willingness to arrange visits with the Troxels voluntarily, Tommie Granville Wynn and her husband Kelly

Wynn were astonished by the court's order. They were particularly concerned about the possibility for continued, unpredictable interference with their parenting decisions and family life by the Troxels, as RCW 26.10.160(3) provides that a new visitation order could be entered "at any time" "whether or not there has been any change of circumstances."[5]

Tommie appealed the visitation order to the intermediate appellate court. (JA 7a) After the Court of Appeals entered an order directing entry of findings (JA 9a), the trial court entered findings and modified the scheduling provisions on January 3, 1996. (CP 127-31, JA 68a-74a) As with the original order, the findings gave no deference to Tommie's assessment of the children's best interest. There is no finding that the Troxels had met any burden to establish the children's best interest. The findings recite as a basis for the imposition of visitation and other orders, the observation that the Troxels could provide the children with "cousins and music." (CP 128, JA 70a)

On July 28, 1997, the Court of Appeals reversed the visitation order, holding that the Troxels lacked standing to petition for visitation independent of a pending custody proceeding. 87 Wn. App. 131, 940 P.2d 698 (1997) (Pet. 55a-71a).

C. *Visitation of Wolcott.*

Four months before the *Troxel* ruling, the Court of Appeals had issued a similar decision in *Visitation of Wolcott*. In *Wolcott*, a man commenced a petition for visitation rights with

[5] This is in contrast to the statutes governing disputes between parents, where there is a very high threshold requirement of a substantial change of circumstances and, with limited exceptions, a parenting plan may be modified only to prevent harm to the child. RCW 26.09.260.

a child 18 months after he and the mother broke up. In November 1993, a Snohomish County superior court commissioner and judge rejected the mother's claim that the ex-boyfriend did not have standing, and ordered temporary visitation. (*Wolcott* CP 108, 119-20) The Court of Appeals rejected the mother's request for interlocutory review. A second superior court judge granted the ex-boyfriend's motion to strike the mother's subsequent motion for summary judgment, declaratory judgment, and to terminate visitation. (CP 49-51) When the matter finally came on for trial in October 1995 before yet a third judge, the court dismissed the petition for visitation on the ground that the ex-boyfriend did not have standing to seek visitation. (CP 8-12) The Court of Appeals affirmed the dismissal. 85 Wn. App. 468, 933 P.2d 1066 (1997).

D. *Custody of Smith.*

At the same time, another appeal of a third party visitation order was pending in the Court of Appeals. Appellant Kelly Stillwell's mother and her estranged husband Brian Smith had killed one another in a gun battle. Five weeks to the day after the homicides, Brian Smith's parents and siblings sued Kelly Stillwell in Island County Superior Court to compel visitation with her 3-year-old daughter Sara.[6] (*Smith* CP 51) The elder Smiths, who lived in Ohio, sought 60 days visitation each year. Brian's siblings, who lived in California and Michigan, asked the court to order 14 days visitation each year with each of them. (CP 52-55)

The *Smith* case had been tried to Judge Pro Tempore Tim Martin. (CP 3) Mr. Martin heard evidence that Brian's parents had visited with Sara six times in the 19 months between Sara's

[6] Brian Smith was not the biological father of Sara, who had been conceived by artificial insemination with donor sperm. (CP 4)

birth and Kelly and Brian's separation, and on five occasions thereafter. Brian's brother had visited with Sara four times, and his sister once, before the separation, but by choice neither had visited with Sara in the 27 months since. (CP 6, RCP 80-94)

Mr. Martin concluded that it would be in Sara's best interest to "resume contact" with the Smiths. (CP 6-7) An order was entered for three weeks unsupervised visitation annually with the Smiths, including two continuous weeks each summer. (CP 12-13) The 10-page order also established guidelines for gifts and phone calls, ordered Kelly Stillwell to provide to the Smiths a written "list of reasonable parenting rules," and appointed a "visitation facilitator," whose services Kelly Stillwell was ordered to partially pay. (CP 15-19) As was true for Tommie Granville Wynn, if Kelly Stillwell failed to comply with the visitation order she was subject to the coercive and penal consequences identified in § B.3, *supra* at 11.

E. Decision On Review.

The ex-boyfriend in *Wolcott* petitioned for discretionary review to the Washington Supreme Court. The Troxels also petitioned for review, although they concede that they continued to enjoy regular visits with Natalie and Isabelle after the Court of Appeals reversed the visitation order. (Pet. Br. at 6) The collateral relatives in *Smith* asked the Washington Supreme Court to accept direct review of Kelly Stillwell's appeal.

The Supreme Court consolidated all three cases and heard argument in April 1998. On December 24, 1998, the Washington Supreme Court held former RCW 26.09.240 and RCW 26.10.160(3) unconstitutional as applied because the statutes violated the protection that the Constitution affords to family autonomy and intimate associations except in certain narrow circumstances that the Washington Supreme Court

recognized as permitting court intervention. *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998) (Pet. 1a-54a).

SUMMARY OF ARGUMENT

The issue before this Court is significantly narrower than, and fundamentally different from, that posed by petitioners. The Washington legislation at issue is not a grandparent visitation statute, much less one that limits the circumstances under which a grandparent can seek visitation to those in which a strong and demonstrable state interest can be identified. Instead, the Washington Supreme Court considered the constitutionality of a statute that allowed "any person" to invoke the power of the courts to order visitation with a child "at any time," and that authorized a court to order visitation whenever it believed that it "may serve the best interest of the child."

Respondent argued below that being forced to defend an action for visitation pursuant to such a statute, and having the state's opinion of what is best for her children substituted for her own - with no presumption that she was acting in her children's best interest, and with no factors to guide the exercise of the court's discretion - violated her family's constitutionally protected interests in privacy, autonomy and association. Even if this Court considers this to be an overbreadth challenge, respondent's standing to challenge these state statutes on this ground in the state's highest court is a matter of state, not federal, law.

At issue in this case is the fundamental right of respondent and other parents to family autonomy, the oldest and one of the most sacred of our personal liberties. Seen against this right and its historical basis, "best interest" - undefined and standardless in the statutes at issue here - is no test at all for deciding claims of a grandparent or other third party to court-

ordered visitation. It does not further a compelling state interest that justifies overriding a parent's childrearing decision. Both the courts of Washington and this Court have in fact consistently limited the use of the state's *parens patriae* power - the interest in children's wellbeing that would justify state intervention in parental decisionmaking - to circumstances in which a child is being detrimentally affected in a very significant way. The statutes at issue are not narrowly tailored to meet the state's interest, as they lack standards for determining both by whom and when such an action can be brought and what must be proven before visitation can be ordered.

The "significant impairment" test suggested by the petitioners has been rejected by a majority of this Court. It is especially inappropriate here, because the government lacks a significant interest in imposing the will of third parties over that of parents in visitation disputes except in the most extraordinary circumstances. This test has been limited to cases in which the Court must weigh a fundamental right against an equally compelling government interest, or when state action only indirectly affects the exercise of a fundamental right. It cannot be used here, where petitioners themselves concede there is no inherent right to grandparent visitation and the burden of litigating these childrearing issues is not only direct, but deadly to, exercise of the family's right to autonomy. In any event, the way in which third party visitation orders necessarily go far beyond scheduling visits, to micro-management of the family lives of the disputants, constitutes a significant impairment of the protected right.

The remedy chosen by the Washington Supreme Court when confronted with three lawsuits that graphically demonstrated the inadequacies of Washington's third party visitation scheme was a powerful one. The choice of what to do with these vague and overbroad statutes may be an issue of separation of power between the legislative and judicial

branches of government in the state of Washington, but it is not a matter that implicates federal law. Rather, it is an issue of state law, in which Washington state may fashion the remedy it considers necessary to insure the constitutional application of its statutes regardless of the constraints a federal court might choose to impose on its own consideration of such a statute.

ARGUMENT

A. This Court Cannot Restrict The Washington Supreme Court's Ability To Consider The Constitutionality Of A Standardless State Statute.

The Washington Supreme Court held RCW 26.10.160(3) and former RCW 26.09.240 unconstitutional for two reasons: (1) the statutes do not properly limit either the individuals who can seek third party visitation or the circumstances under which third party visitation can be sought; and (2) the statutes do not place on individuals seeking visitation a burden of proving that the parent's decision is not in a child's best interest - that is, that it would harm the child. This was not a ruling that the statutes are facially overbroad. Even if it was, petitioners cannot ask this Court to restrict the ability of a state's highest court to entertain a facial challenge based on principles of standing and statutory construction that are purely a function of state law.

Limits imposed by this Court on facial challenges do not apply where the constitutional infirmity is not just that a law may be applied to protected conduct, but that a standardless decisionmaking process undermines constitutionally protected interests. *See City of Chicago v. Morales*, __ U.S. __, 119 S. Ct. 1849, 1866 (1999) (Breyer, J., concurring) ("if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications") (emphasis in original); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Respondent has standing to assert that she

had the right to be judged by a rule of law that safeguards her family's constitutionally protected rights.

Even were this a facial challenge, the restrictive tests relied upon by petitioners, and the principles of federalism and separation of powers from which they derive, do not apply where a state's highest court has decided to entertain an overbreadth challenge to a state law. The limitations that this Court imposes on its own power to consider the unconstitutional applications of a statute are grounded in the federal courts' discretionary limitations on standing:

> When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution.

Morales, 119 S. Ct. at 1858-59 n.22 (plurality opinion). These "prudential" limitations have no application and "would serve no functional purpose" where a state court has chosen to reach the merits of a constitutional claim. 119 S. Ct. at 1858-59 n.22, *quoting City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 243 (1983).

There is no merit to petitioners' argument that this Court must now hold respondent to the standing requirements applicable either on review of federal court challenges to federal statutes, *e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987), or to state statutes, *e.g.*, *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, No. 98-678 (12/7/99). More particularly, petitioners' contention that a facial challenge to Washington's third party visitation statutes "would face insurmountable jurisdictional problems under Article III['s]"

requirement of a case or controversy (Pet. Br. at 21) is irrelevant in this case, which was litigated entirely in the state courts. The Washington court is free to adopt different rules of standing to mount a constitutional challenge of a state statute than those applied by this Court.

Equally specious is petitioners' argument that this Court should refrain from considering the due process deficiencies inherent in these overbroad statutes on the hope that the state court might construe RCW 26.10.160(3) to avoid "possible constitutional problems." (Pet. Br. at 20 n.39) The state court has already rejected the request to narrowly construe these statutes. This Court cannot resuscitate a statute that petitioners concede has some unconstitutional applications (Pet. Br. at 21, 45) by hoping that the Washington court might someday reconsider its interpretation of RCW 26.10.160(3).

This Court lacks jurisdiction to authoritatively construe state legislation. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). Federalism therefore requires that a federal court be loathe to invalidate a state statute "on a facial challenge based upon a worst-case analysis that may never occur." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). But this principle, relied upon so emphatically by petitioners, has no application where, as here, a state's highest court has accepted a challenge after finding that it cannot narrowly construe the statute to avoid constitutional infirmities. The Washington court's construction of RCW 26.10.160(3) is binding on this Court. *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972). The petitioners' attempt to offer a narrower interpretation of the statute as one giving grandparents special status to seek visitation after the death of a child thus must be rejected.

In any event, in considering the effect of these statutes the Washington court had before it the claim of not only biological

grandparents, but the claims of an ex-boyfriend and of an "aunt" by affiliation who had, by choice, visited with the child with whom she obtained court-ordered visitation only once in four years. Each of these parties below relied for their "rights" to seek visitation on the language of RCW 26.10.160(3) or former RCW 26.09.240. The three cases considered by the court below amply support a determination that these statutes preclude the application of a constitutionally sufficient rule of law in a "large fraction" of cases. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

Petitioners have conceded that this statute can be unconstitutionally applied. They cannot complain in this Court of respondent's standing to challenge these statutes in the state's highest court.

B. Parents Have The Right To Raise Children Free Of State Interference.

The Washington Supreme Court's decision was compelled by the nature of the interest asserted by the parents who had been sued for visitation in the cases before it. The right to raise one's children free of state interference is the oldest of the personal liberties first identified and protected by this Court over 75 years ago. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). "The history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Even as this Court has rejected attempts to expand the interests included within the liberties protected by the Constitution, it has singled out this right for special protection. *See Moore v. City of East Cleveland*, 431 U.S. 494, 501 n.8

(1977) (plurality opinion) (*Meyer* and *Pierce* survive, "while other substantive due process cases of the same era have been repudiated"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Conn v. Gabbert*, __ U.S. __, 119 S. Ct. 1292, 1294 (1999).

The historical right to raise children free of state interference cannot be framed as the highly generalized and abstract issue of "grandparents' rights" proposed by the petitioners. Instead, the issue is whether the state may order visitation with "any person" "at any time," without proof that an indisputably fit custodial parent is not acting in her child's best interest, based on the standardless exercise of a judge's discretion. The common law would never have allowed such a thing. Families "formed the first natural society, among themselves. . ." 1 Blackstone, *Commentaries on the Laws of England* *47. At common law, the state did not interfere with the family. The family was viewed as an autonomous entity, existing under natural law separate and independent of the state. The state's ability to intervene in family matters was limited to protecting the parent-child relationship. 1 Blackstone, *Commentaries* at *453. Washington's statute conflicts with this longstanding tradition and the unanimous practice of the other states. *See* § D, *infra*.

This Court held that the liberties protected by the Due Process Clauses of the Fifth and Fourteenth Amendments encompass this right to bring up children free of state interference in the first significant family rights case, *Meyer v. Nebraska*, 262 U.S. 390 (1923). Relying on *Meyer*, the Court two years later struck down an Oregon statute requiring children to attend public schools as unduly interfering with the right of parents in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The *Pierce* Court first articulated the parental obligations that accompany the right to make decisions for children:

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

268 U.S. at 535.

The right to rear children free of unnecessary state interference thus is the most enduring of the substantive protections recognized by this Court. Though established during the height of the "Lochner era," *see Lochner v. New York*, 198 U.S. 45 (1905), these cases have remained as binding precedents and have been relied upon by succeeding generations, including the Warren Court, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Burger Court, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1971), and the Rehnquist Court, *e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). As this Court recently reiterated, "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

This Court has recognized that the right of parents to raise their children free of state interference is within the Constitution's protections of privacy, *e.g.*, *Griswold v. Connecticut*, 381 U.S. at 484; liberty, *e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); personal integrity, *e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); and association, *e.g.*, *Moore*, 431 U.S. at 505. Petitioners' attempt to limit *Yoder*, *Pierce* and *Meyer* as turning solely on the free-exercise clause of the First Amendment (Pet. Br. at 26) was rejected by this Court in *Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990). And this Court in fact

recognized the First Amendment roots of the "intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme" in *Roberts v. Jaycees*, 468 U.S. at 617 (*citing Pierce* and *Meyer* at 618).

This Court has also rejected the attempt by petitioners and their amici to carve out from this fundamental right the supposedly "minor" substitution of a judge's decision with whom children should associate and when. The right to decide with whom one will associate is at the very core of the intimate family relationship that is afforded constitutional protection. *See Roberts v. Jaycees*, 468 U.S. at 619-20. Many of this Court's decisions have struck down restrictions less drastic than the termination of parental rights that petitioners assert is the only justification for invocation of the right to parental autonomy. (Pet. Br. at 26-27) *See, e.g.*, *Meyer*, *Pierce*, *Yoder* (educational decisions); *Moore* (living arrangements); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (visitation).

This personal liberty both encompasses and is limited to family members who share an intimate living relationship. It is "the emotional attachments that derive from the intimacy of daily association, and the role it plays in 'promot(ing) a way of life' through the instruction of children . . . as well as from the fact of blood relationship," that justifies respondent in asserting her rights to decide with whom and when her children will visit. *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 n.22, 844 (1977), *quoting Wisconsin v. Yoder*, 406 U.S. at 231-33. For this reason, petitioners' reliance on *Michael H.* is misplaced. There it was the custodial mother and her husband, the putative father, who were entitled to assert the family autonomy right, not the biological father who sought visitation over the family's objection. *See also Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (rejecting claim of biological father who

had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child" to allow adoption of a child by a stepfather who had acted as a parent).

Further, in asserting this right respondent acts not only for herself, but for her children. As this Court recognized in *Smith v. Foster Families*, "[c]hildren usually lack the capacity to make [the] decision [how to best protect their interests], and thus their interest is ordinarily represented in litigation by parents or guardians." 431 U.S. at 841 n.44. Unlike in *Smith*, where "the State, the natural parents, and the foster parents" all shared "some portion of the responsibility for guardianship" of children who had been placed in foster care, in this case there is no question as to the fitness of respondent, or as to her continuing responsibility as the children's mother. The children's interest is thus represented by her in this litigation:

> For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it.

Parham v. J.R. 442 U.S. 584, 621 (1979) (Stewart, J., concurring).

The fact that, when this litigation began, Tommie Granville Wynn was a single mother, and not acting on behalf of what is sometimes called an "intact" family, does not lessen her ability to assert the family's right. "The legal status of families has never been regarded as controlling." *Smith*, 431 U.S. at 845, n.53, *citing Stanley v. Illinois*, 405 U.S. at 651; *see also Moore v. City of East Cleveland*, 431 U.S. at 501-02. Indeed, granting children in an "intact" family the right to have their parents make childrearing decisions, while denying that right to children whose biological parents are not living together, would raise

other constitutional issues. *See Gomez v. Perez*, 409 U.S. 535 (1973). Nor can such a distinction be supported by sociological or other policy considerations:

> A child's need for continuity requires the state to recognize that a new family has been established the moment it has determined who shall be custodial parent. The new family deserves, therefore, to be as free of state intervention as any other "intact" family.

Goldstein, Solnit and Freud, *The Best Interests Of The Child* 32 (rev. ed. 1996).

The right to raise one's children without state interference is the most sacred and enduring of our personal liberties. It is invoked not only on behalf of the individual, but in stewardship of the life of a child with whom the parent shares the intimacies of daily life. This privileged right is not to be taken away and given to the state at the whim of a grieving relative or any other person who files a lawsuit invoking the coercive power of the state to impose a different view of a child's "best interest."

C. An Undefined And Standardless "Best Interest" Test Does Not Reflect A Compelling State Interest That Can Justify Overriding A Fit Parent's Childrearing Decisions.

The state may not interfere with the way in which parents raise their children without a compelling state interest. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion). The government may not infringe "'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original). The statutory recital that state

action "may serve the best interest of the child," does not satisfy this exacting standard. The statutes at issue do not properly invoke the state's *parens patriae* power, which has always required a showing of parental unfitness or other evidence of harm to the child.

This Court in *Stanley v. Illinois*, 405 U.S. 645 (1977) rejected a state's reliance on "best interest" as "the only relevant consideration in determining the propriety of governmental intervention in the raising of children." 405 U.S. at 653 n.5. The state advances the best interest of the child by giving "full recognition to a family unit already in existence." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). The best interest of the child standard thus is properly used to decide unavoidable disputes between parents, but not between a custodial parent and the state, or between a custodial parent and a third party who invokes the power of the state to seek court-ordered visitation.

Enunciation of the "best interest" standard in legal disputes over children is a relatively recent phenomenon. Consistent with its common law tradition, pre-revolutionary Anglo-American law vested in fathers the right to custody of their minor legitimate children, who were viewed as an asset of the father's estate. Grossberg, *Governing The Hearth* 235 (1985). This view prevailed until the early 19th century, when state courts began to temper the primacy of paternal property rights with concern for child nurture and acceptance of women as distinct legal individuals. *See, e.g., Prather v. Prather*, 4 Des. 33 (S.C. 1809); *Commonwealth of Pennsylvania v. Addicks*, 5 Binn. 520 (Pa. 1813).

With the door open to competing custody claims of mothers and fathers, courts began to use their equitable discretion to select a custodial parent. Chancellor Kent recognized the primacy of paternal rights, but noted that the father's rights

could be disregarded depending on the particular "nature of the case." Kent, *2 Commentaries on American Law* *194-95. Justice Story similarly espoused a case-by-case examination of the relative fitness of each parent. Story, *2 Equity Jurisprudence* *596-97. By the late 19th century, state legislation had preempted the common law rights of the father, putting the parents on equal ground and leaving "the question of custody to the unrestrained judicial discretion." *2 Bishop on Marriage and Divorce* § 532 at 457 (6th Ed. 1881). During the 20th century, state legislation often adopted the "best interest of the child" standard to enable judges to make a fair and equitable custody decision between a child's parents. *See, e.g.*, former RCW 26.09.190. (RA 3)[7]

Petitioners' argument that respondent asserts a right that would preclude the use of the "best interest" test in disputes between parents thus is a particularly disreputable straw man. (Pet. Br. at 35-36 n.48) In Washington, as in other states, it may be that the best interest of the child standard "is properly applied between parents, *In re Marriage of Croley*, 91 Wn.2d

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[7] Washington state came late to statutory use of the standard, and abandoned it after just 14 years. An 1879 territorial act provided that "The rights and responsibilities of the parents in the absence of misconduct shall be equal . . ." Former RCW 26.16.125. (RA 1) In the next significant revision of domestic relations legislation, the 1949 Divorce Act provided that the court "shall make provisions . . . for the custody, support and education of the minor children of the marriage . . ." Former RCW 26.08.110. (RA 2) The 1973 Dissolution Act was the first to codify the "best interest" standard, listing five criteria for determining the court's consideration and expressly providing that conduct of a parent that did not affect the welfare of the child was not to be considered. Former RCW 26.09.190. (RA 3) The 1987 Parenting Act lists independent criteria for allocating residential time and decision-making but does not recite the best interest standard, at least in part because of criticism that former RCW 26.09.190 had offered "inadequate guidance to courts and parties." 1987 Proposed Parenting Act, Commentary and Text, at 9. (RA 25)

288, 588 P.2d 738 (1978), but between a parent and a nonparent, application of a more stringent balancing test is required . . ." *Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16, 21 (1981). Equally specious is petitioners' claim that recognizing respondent's parental rights would have prevented Brad Troxel from taking the children to visit his parents. (Pet. Br. at 47) Had such a dispute arisen, it would have been between the children's parents and resolved pursuant to the Washington Parenting Act. *See* Fact § A.1, *supra* at 2-3.

This Court has also recognized "best interests," "a venerable phrase familiar from divorce proceedings," as "a proper and feasible criterion for making the decision as to which of two parents will be accorded custody." *Reno v. Flores*, 507 U.S. 292, 303-04 (1993). But this Court rejected use of "best interests" as the criterion "for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others." *Flores*, 507 U.S. at 304 (denying challenge to an INS regulation permitting release of detained juvenile aliens in most instances only to parents, close relatives, or legal guardians).

The state's interest in securing a child's best interest based on some neutral standard is properly asserted in the case of parental separation because a child's parents, both of whom are in the process of forming new autonomous families, cannot agree. But only when parents turn to the courts to resolve their parenting disputes do they open up "the private realm of family life" to state interference. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Even where other competing fundamental interests are at stake, use of a best interest test contrary to a parent's "informed and reasonable decision . . .is fundamentally at odds with privacy interests underlying the constitutional protection afforded" a parent's decisionmaking. *Bellotti v. Baird*, 443 U.S. 622, 656 (1979) (Stevens, J., concurring).

A best interest standard that gives no deference to a fit parent's decisionmaking fails to meet the compelling state interest test. Best interest is inherently indeterminative, both because society lacks the tools to make intelligent predictions about the future - an implicit feature of intervention in childrearing decisions - and because there is no single set of social values to be used in making the decision. Mnookin, *Child-Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 257 (Summer 1975). At base, best interest "is not properly a standard. Instead, it is a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured." Rodham, *Children Under the Law*, 43 Harv. Ed. Rev. 487, 513 (1973).

Nothing in the legislative history suggests what state interest the Washington legislature intended to serve in enacting these statutes. The state Attorney General as amicus has invoked the state's *parens patriae* power as justification for third party visitation statutes. (Wash. Ami. at 17) But the *parens patriae* power has consistently been invoked only to prevent harm to a child. The first substantive reference to the doctrine in this Court was in *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944), where this Court confirmed that the use of the state's *parens patriae* power is appropriate to protect a child from harm. And both the majority and the dissent recognized that the state's power to invoke *parens patriae* arises only with a finding of parental unfitness or of harm to the child in *Santosky v. Kramer*, 455 U.S. 745, 760 (Opinion of the Court), 788 n.13 (Rehnquist, J. dissenting) (1982).

Until the 19th century, state intervention in the family was unknown. *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 898-900 (1975). The state invoked its *parens patriae* power first to protect the public from poor and

delinquent children, and only later to protect children from physical, and later, emotional abuse. Rendleman, *Parens Patriae: From Chancery To The Juvenile Court*, 23 S. Car. L. Rev. 205, 218-19, 226-29 (1971); Areen, 63 Geo. L. J. at 899-911. Each state adopted statutes defining child neglect and authorizing judicial action to protect neglected children. Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 988 n.15 (1975). But even as state intervention to "protect" children became accepted practice, the integrity of the family remained a dominant state interest. Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177, 186 (1916) ("[I]t remains true that the social interest in the family as a social institution requires the law to proceed with great caution in securing the interests of children against their parents.").

Consistent with this historical precedent, Washington has invoked its *parens patriae* power only "when parental actions or decisions seriously conflict with the physical or mental health of the child." *In re Sumey*, 94 Wn.2d 757, 621 P.2d 108, 110 (1980). In *Sumey*, the Washington Supreme Court approved a temporary removal of a child from the family home that was intended in the end to strengthen the family unit. This situation is drastically different than that in third-party visitation disputes. There the dispute is between the parents and a third party whose goal in seeking visitation is to override the parent's childrearing decisions, rather than between the parents and the child.

Unfitness has been the trigger for state interference in parental decisionmaking in Washington state since the *parens patriae* power in matters of child custody was first recognized in *Russner v. McMillan*, 37 Wash. 416, 79 Pac. 988 (1905). Fit parents owe state officials no explanation for their childrearing choices, so long as they are not endangering their children. For instance, parents are free to choose the kind of education to

provide, even though state officials may be troubled that the parental choice will not advance the child's best interest. *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923). Parents are free to make, or refuse to make, medical decisions for their children, even though medical providers may be troubled that the parental choice will not advance the child's best interest. *In re Hudson*, 13 Wn.2d 673, 126 P.2d 765, 778, 783 (1942). Parents are free to make both the very large and the very small childrearing decisions free from the obligation to explain themselves in a court of law.

As the Washington Supreme Court held, the Washington statutes at issue here are not a proper exercise of the state's *parens patriae* power. When the only thing the state can say as justification for overriding parental decisions concerning when and with whom their children should visit is that it "*may* serve the best interest of the child," the state has failed by its own logic to demonstrate a compelling ground for intervention. There must be a significantly stronger showing, and a legislative response narrowly tailored to meet it, before the state's power may be brought to bear in disputes in which parents are not the only litigants.

D. Washington's Third Party Visitation Statutes Are Not Narrowly Tailored To Serve A Compelling State Interest.

The *parens patriae* power is often invoked to justify state action of questionable constitutionality: The "exercise of the power of the state as *parens patriae* [is] not unlimited. . . . '[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.'" *In re Gault*, 387 U.S. 1, 30 (1967), *quoting Kent v. United States*, 383 U.S. 541, 555 (1966). This Court therefore has rejected judicial deference to the operation of enactments that allow "intrusive regulation of family:"

> [W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion). A party invoking the state's power must produce evidence that the burden on the exercise of a fundamental right is connected to sound policy. *Carey v. Population Services, Intern.*, 431 U.S. 678, 696 (1977) (plurality opinion).

Petitioners fail to explain how the Washington statute at issue here is crafted to serve any compelling interest. RCW 26.10.160(3) is in fact far broader than the visitation statutes enacted in each of the other states whose case law petitioners cite. As the Washington Supreme Court recognized, this statute fails a constitutional challenge first because it allows "any person" to petition a court for visitation, second because it allows such an action "at any time," and third because the court may order visitation whenever it "may serve the best interest of the child," with no criteria for establishing, nor presumption that a parent will act in, the child's "best interest." These deficiencies will be examined in turn:

The Washington statute allows "any person" to petition the court for visitation. Among the states, only Alaska and Connecticut afford to "any person" the right to seek visitation with a child.[8] In most states, the right to seek visitation is either

[8] ALASKA STAT. §25.24.150; CONN. GEN. STAT. §46b-59. Alaska only allows a non-parent to intervene in pending custody proceedings. Connecticut has imposed significant restrictions by requiring the individual seeking visitation to prove that there has been a disruption in the child's (continued...)

limited to grandparents or other carefully limited categories of relatives, such as great-grandparents[9] or siblings, [10] or to individuals who have acted as a parent to the child[11] or who can demonstrate some other significant relationship.[12]

The Washington statute allows "any person" to seek visitation "at any time." Only seven states, each authorizing visitation actions only by grandparents or great-grandparents, do not limit when a court can order visitation.[13] Many of the other states, like Washington under current RCW 26.09.240, allow a visitation petition when a divorce or other action has

[8](...continued)
life sufficient to justify state intrusion in order to avoid constitutional problems with its statute. *Castagno v. Wholean*, 684 A.2d 1181, 1189 (Conn. 1996).

[9] ARIZ. REV. STAT. §25-409; ARK. CODE ANN. §9-13-103; CAL. FAM. CODE §3102; IDAHO CODE §32-719; ILL. REV. STAT. ch. 750, ¶5/607; IOWA CODE §598.35; MINN. STAT. §257.022; NEV. REV. STAT. §125A.330; N.J. STAT. ANN. §9:2-7.1; 23 PA.C.S.A. §5311.

[10] ILL. REV. STAT. ch. 750, ¶5/607, ch. 755, ¶5/11-7.1; LA. CIV. CODE art. 9:344; NEV. REV. STAT. §125A.330; N.J. STAT. ANN. §9:2-7.1.

[11] CAL. FAM. CODE §3101 (stepparent); MINN. STAT. §257.022 (child lived in household); WIS. STAT. §880.155 (stepparent). *See* American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* §2.04 (Tentative Draft No. 3 1998) ("de facto parent").

[12] *See* VA. CODE ANN. § 20-124.1 ("person with legitimate interest"); CAL. FAM. CODE §3100 ("any other person having an interest in the welfare of the child"); OHIO REV. CODE §3109.051(B)(1)(b) ("other person [with] an interest in the welfare of the child"). This is also the approach of current RCW 26.09.240, which allows a person who can prove a significant relationship by clear and convincing evidence to seek visitation if parenting proceedings are pending between the parents.

[13] HAW. REV. STAT. §571-46.3; IDAHO CODE §32-719; KAN STAT. ANN. §38-129; MD. CODE ANN. FAM. LAW §9-102; OKLA STAT. tit. 10, §5; W. VA. CODE §48-2B-4(b); WYO. STAT. §20-7-101.

put custody of a child at issue.[14] Alternatively, the grandparent must demonstrate that access to the child has been unreasonably or for some express period of time denied.[15]

Petitioners and many of the amici treat this case as though it arose under a statute providing for grandparent visitation after the death of the grandparent's child. The Court would itself be drafting a "grandparent visitation" statute for Washington were it to rely on petitioners' assertion that a statute providing for visitation with grandparents after a parent's death would pass constitutional muster. But Washington state has refused to grant special visitation rights to grandparents on at least three occasions. *See* Fact § A.2, *supra* at 5-6. Washington has not determined when any narrow category of non-parents, much less grandparents, should as a matter of state policy be able to seek court-ordered visitation outside a pending parenting proceeding. Further, the Washington courts have expressly rejected petitioners' proposition that a grandparent can assert some "derivative" right to visitation based on the parent's

[14] ALA. CODE §30-3-4; ALASKA STAT §25.24.150; ARIZ. REV. STAT. §25.409; ARK. CODE ANN. §9-13-103; CAL. FAM. CODE §§3021, 3100; COLO. REV. STAT. §19-1-117; IND. CODE §31-17-5-1; IOWA CODE §598.35; MASS. GEN. L. ch. 119; §39D; MICH. COMP. LAWS ANN. §25.312 (7b); MINN. STAT. §257.022; MISS. CODE ANN. §93-16-3; MO. REV. STAT. §452.402; NEB. REV. STAT. §43-1802; NEV. REV. STAT. §125A.330; N.J. STAT. ANN. §9:2-7.1; N.M. STAT. ANN. §40-9-2; N.C. GEN. STAT. §50-13.2; 23 PA.C.S.A. §5312; TEX. FAM. CODE ANN. §153.433; VT. STAT. ANN. ti.18, §1011.

[15] ALA. CODE §30-3-4; MO. REV. STAT. §452.402; N.M. STAT. ANN. §40-9-2; OR. REV. STAT. §109.121; R.I. GEN. LAWS §15-5-24.3; UTAH CODE ANN. §30-5-2.

relationship with the child before death. (Pet. Br. at 47-48)[16] *Custody of Thompson*, 34 Wn. App. 643, 663 P.2d 164 (1983).

Petitioners therefore cannot assert that RCW 26.10.160(3) furthers the state's interest in insuring visitation after the death of the grandparents' child. In any event, in striking down these statutes the Washington Supreme Court had before it the claims not only of these petitioning grandparents, who had never been denied access to their grandchildren, but of an ex-boyfriend who waited 18 months before seeking visitation, and of siblings of another custodial mother's deceased husband who filed their action barely a month after his death.

Petitioners and amici also treat this case as though it arose under a statute that places the burden to prove that court-ordered visitation is in a child's best interest on the party seeking visitation.[17] But the Washington statute itself authorizes the court to order visitation whenever the court believes it "may serve the best interest of the child." It imposes no burden on the third party seeking visitation. Petitioners' assertion that the *respondent* must prove that the orders entered place an "undue burden on the exercise of a fundamental right" in fact would place the burden on a fit parent. *See* § E.1, *infra*

[16] Petitioners' suggestion that their son's right to residential time could somehow be "willed" to them (Pet. Br. at 47) is particularly feudal. In the 17th century, a mother had no legal rights to custody after her husband's death; the father could will custody of his children to a guardian. Mason, *From Father's Property To Children's Rights* 19 (1994).

[17] Contrary to the assertion of petitioners and of amici AARP and Grandparents United for Children's Rights, the states are not uniform in their use of the "best interest" test for grandparent visitation. The statutes of Alabama, New Mexico, North Carolina, and Rhode Island (when visitation is sought after a parent's death) do not recite the "best interest" mantra as the basis for an award of visitation. ALA. CODE §30-3-4; N.M. STAT. ANN. §40-9-2; N.C. GEN. STAT. §50-13.2; R.I. GEN. LAWS §15-5-24.1.

at 40-44. And the Washington Supreme Court had before it visitation orders that did not purport to place the burden on the parties seeking visitation, but simply substituted the court's opinion of what "may serve the best interest of the child" for that of these children's admittedly fit mothers.

Petitioners cite cases from seven jurisdictions other than Washington state for the proposition that the petitioners met some "burden of persuasion" that court-ordered visitation was in the best interest of their grandchildren. (Pet. Br. at 11, n.23) Each of these states,[18] and many others,[19] place the burden on the person seeking visitation to prove that visitation is in the child's best interest. In many states, as is now true in Washington under RCW 26.09.240 when third party visitation

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[18] *Rosemary E.R.. v. Michael G.Q.*, 471 A.2d 995, 997 (Del. 1984); *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997); *Wolinski v. Browneller*, 693 A 2d 30, 41-42 (Md. 1997); N.J. STAT. ANN. §9:2-7.1; *Ridenour v. Ridenour*, 901 P.2d 770, 775 (N.M. Ct. App. 1995); *Norris v. Tearney*, 619 A.2d 339, 340 (Pa. Super. 1993); UTAH CODE ANN. § 30-5-2 ("clear and convincing evidence").

[19] GA. CODE ANN. §19-7-3 (*but see* n.23, *infra*); IDAHO CODE §32-719; *West v. West*, 689 N.E.2d 1215, 1221 (Ill. App. 1998) (statute constitutional because of burden); *Weybright v. Puckett*, 635 N.E.2d 119, 121 (Ill. App. 1994); *Santiello v. Santiello*, 850 P.2d 269, 271 (Kan. App. 1992); NEB. REV. STAT. §43-1802 ("clear and convincing evidence"); *Steward v. Steward*, 890 P.2d 777, 782 (Nev. 1995) ("clear and convincing evidence"); *O'Brien v. O'Brien*, 684 A.2d 1352, 1354 (N.H. 1996); *Kerns v. Southern*, 397 S.E.2d 651, 652 (N.C. App. 1990); *Tope v. Kaminski*, 793 S.W.2d 315, 317 (Tex. App. 1990) (must show "parental abuse or neglect"); VA. CODE ANN. §20-124.2 ("clear and convincing evidence"); W. VA. CODE §48-2B-7. Judicial imposition of such a burden was relied upon in the intermediate appellate courts to insure constitutional application of the Tennessee statute until Tennessee's highest court declared the statute unconstitutional under that state's constitution in *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). And in each of these states, and in those listed in note 18, visitation is limited to grandparents or great-grandparents.

is requested during proceedings between the parents, express criteria guide the court's exercise of its discretion in determining the child's "best interest."[20]

Such narrowly tailored safeguards are absent from the statutes considered by the court below. And because Washington assiduously eliminated any presumption between the parents as to where the best interest of a child lay after enactment of former RCW 26.09.190,[21] there is no reason to believe that any Washington court would presume that a parent is acting in a child's best interest in disputes between parents and third parties.

The Washington statute does not properly reflect "the traditional presumption that the parents act in the best interests of the child . . ." *Parham v. J.R.*, 442 U.S. 584, 604 (1979). Indeed, state interference with a parent's childrearing decision might well require a heightened burden of proof.[22] "This Court

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[20] ALASKA STAT. §25.24.150; ARIZ. REV. STAT. §25-409; *Baker v. Perkins*, 774 S.W.2d 129 (Ky. Ct. App. 1989); ME. STAT. ANN. §1803; *Fairbanks v. McCarter*, 622 A.2d 121 (Md. 1993); *Martin v. Coop*, 693 So.2d 912 (Miss. 1997); NEV. REV. STAT. §125A.330; N.J. STAT. ANN. §9:2-7.1; N.M. STAT. ANN. §40-9-2; OHIO REV. CODE §3109.051(D); OKLA STAT. tit. 10, §5; UTAH CODE ANN. §30-5-2; VA. CODE ANN. § 20-124.3; W. VA. CODE §48-2B-5(b).

[21] Any "tender years" presumption that young children should be placed with their mother was formally rejected in *Marriage of Murray*, 28 Wn. App. 187, 622 P.2d 1288, 1290-91 (1981) and *Marriage of Janovich*, 30 Wn. App. 169, 632 P.2d 889, 891 (1981). A presumption that permanently placing children with the parent who acted as primary caregiver during the pendency of a dissolution action would best serve their interests was rejected in *Marriage of Kovacs*, 121 Wn.2d 795, 854 P.2d 629 (1993).

[22] *See, e.g.*, GA. CODE ANN. §19-7-3; RCW 26.09.240 ("clear and convincing evidence" of "significant relationship"); *Wolinski v.*

(continued...)

has mandated an intermediate standard of proof - 'clear and convincing evidence' - when the individual interests at stake in a state proceeding are both 'particularly more important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982), *quoting Addington v. Texas*, 441 U.S. 418, 424 (1979). An enhanced standard of proof is necessary where protected liberty interests are at stake, "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. at 423. *See Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 282-83 (1990).

A best interest standard, bereft of any criteria that will protect a parent's interest in autonomous decisionmaking, is not narrowly tailored to meet any compelling state interest. *See In re Gault*, 387 U.S. 1, 18 (1967) ("unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure"). The best interest standard "provides little real guidance to the judge and his decision must necessarily reflect personal and societal values and mores. . . ." *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring). The substantive right to parental autonomy necessarily includes protection from state action that allows infringement of that right in an arbitrary and standardless manner. *See Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402 (1966) (state law allowing jury to assess costs against acquitted criminal

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[22](...continued)
Browneller, 693 A.2d 30 (Md. 1997) (parent's decision "detrimental"); NEB. REV. STAT. §43-1802 ("clear and convincing evidence"); *Steward v. Steward*, 890 P.2d 777, 782 (Nev. 1995) ("clear and convincing evidence"); R.I. GEN. LAWS §15-5-24.1 ("clear and convincing evidence" parent's decision unreasonable); *Tope v. Kaminski*, 793 S.W.2d 315, 317 (Tex. App. 1990) (must show "parental abuse or neglect"); UTAH CODE ANN. §30-5-2 ("clear and convincing evidence"); VA. CODE ANN. §20-124.2 ("clear and convincing evidence").

defendant "invalid under due process clause because of vagueness and the absence of any standards . . .").

Respondent does not contend that the states are constitutionally barred from ever granting grandparents, or others who can establish a significant relationship with a child, the right to court-ordered visitation. Indeed, some of the third party visitation statutes adopted and interpreted by the various states protect parental rights - through standing requirements, presumptions, burdens of proof, and recital of specific factors that require a court to consider family autonomy in defining a child's best interest. But the fact that some of the states' experiments may have been successful does not mean that Washington's has been.[23] Because Washington's third party visitation statutes are not narrowly tailored to serve the state's *parens patriae* power, the Washington Supreme Court was justified in striking down the statutes.

E. The "Undue Burden" Test Is Not Appropriately Applied To This Direct Infringement On A Protected Family Right On Behalf Of Third Parties Who Can Assert No Fundamental Interest In Visitation With A Child.

This Court has steadfastly reviewed state action directly infringing on fundamental rights under a constitutional standard of strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 n.17 (1997) ("[W]e have never abandoned our

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[23] The Washington Supreme Court is by no means alone in striking down its state's third party visitation statute on constitutional grounds. *See, e.g., Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999); *Williams v. Williams*, 485 S.E.2d 651 (Va. App. 1997); *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996); *Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga.), *cert. denied*, 516 U.S. 942 (1995).

fundamental-rights-based analytical method"), *citing Reno v. Flores*, 507 U.S. 292, 301-305 (1993). The "significant impairment" test suggested by the petitioners may be appropriate where the Court is faced with balancing a fundamental right against an equally compelling governmental interest, or where the challenged state action is facially neutral and only indirectly burdens a protected liberty interest. But such a balancing test must be rejected where, as here, court-ordered visitation directly infringes on parental autonomy and there is no constitutionally protected right or compelling state interest in third party, or even grandparent, visitation. Even were the Court to adopt petitioners' balancing test, the burden of litigation itself and the micro-management of the family lives of custodial parents, enforced by the state's coercive and punitive contempt power, constitute a "significant impairment" of respondent's right to parental autonomy.

1. The "Undue Burden" Standard Does Not Apply To State Legislation Directly Infringing On A Fundamental Right Unless Supported By An Equally Compelling Interest.

Petitioners do not dispute that respondent has a fundamental right to parental decisionmaking free of state interference. Instead, contrary to this Court's recent pronouncements in *Glucksberg* and *Flores*, they contend that the validity of the governmental action "turns in part on the magnitude of its impact" (Pet Br. at 22) on the protected right.

The Court has referred to a "substantial infringement" or "undue burden" standard only where a fundamental right must be balanced against an equally fundamental and compelling state interest. For instance, in abortion cases the state has a vital and compelling "interest in protecting the life of the unborn," *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion), and "the undue

burden standard is the appropriate means of reconciling the State's interest [in life] with the woman's constitutionally protected liberty." 505 U.S. at 876. Similarly, the Court weighed a patient's right to refuse medical treatment against the state's equally compelling interest in safeguarding an individual's personal choice between life and death in *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 281-82 (1990).

Legislation that attempts to balance two equally compelling or fundamental interests is thus treated differently than state action directly restricting a fundamental right. Petitioners' analogy to parents asserting "a constitutional right to control the curriculum taught to their children in public schools" (Pet. Br. at 29) fails precisely because it ignores this distinction. The state undoubtedly has a compelling interest in providing its citizens with an education sufficient to "'prepare pupils for citizenship in the Republic.'" *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). But it may not compel a parent to send his or her child to public school against the parent's wishes. *Runyon v. McCrary*, 427 U.S. 160, 178 (1976). Thus, although the parents' privacy and free exercise rights were unquestionably affected by school officials' curriculum choices in *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1065, 1072-73 (6th Cir. 1987) (en banc) (discussed in Pet. Br. at 29), the parents were not compelled to expose their children to a curriculum they found offensive. Indeed, the parents in *Mozert* exercised their prerogative to home school their children, or to send them to religious schools. 827 F.2d at 1060.

Petitioners attempt to extend the constitutional right to privacy in "family" decisions to include grandparents and other collateral relatives who do not act as custodial or psychological parent. (Pet. Br. at 39-46) But there is no historical precedent for extending the right to family autonomy to non-custodial grandparents. At common law, third parties, including

grandparents, had no right to seek court-ordered visitation against the wishes of parents. *Succession of Reis*, 15 So. 151, 152 (La. 1894); *see generally, Annot., Visitation Rights of Person Other Than Natural or Adoptive Parents*, 98 A.L.R.2d 325 (1964). Indeed, given typical life expectancies, most children never knew their grandparents. Cherlin and Furstenberg, *The New American Grandparent* 24-26 (1992). The constitutional protection accorded the sanctity of the family relationship is limited to those that exist between parent and child, *Meyer v. Nebraska*, 262 U.S. 390 (1923), or the functional equivalent of parent and child, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), who share "the intimacy of daily association." *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977). Judicial reluctance to compel third party visitation was consistent with the common law's respect for parental autonomy.

This limitation of the privacy right to those living in intimate association means, as petitioners tacitly recognize, that they have no special right simply because of their biological connection to Natalie and Isabelle:[24]

> To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associated freedoms that the Constitution has been understood to protect.

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[24] Petitioners strongly relied on this biological tie below in discounting respondent's explanation that she had to balance the interests of five sets of grandparents in the Wynns' extended family: "[T]here are only two (birth) grandmothers and grandfathers. (Mrs. Winn's [sic] father is not in the picture, as I understand it.). The other 'grandparents' may be step-grandparents, Mr. Winn's [sic] parents." (CP 3)

Moore, 431 U.S. at 535 (Stewart, J., dissenting). "The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together . . . [M]aking the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all." *Hodgson v. Minnesota*, 497 U.S. 417, 452 (1990) (*citing Moore* and *Meyer*). As the petitioners' asserted "right" to third party visitation has no constitutional component, there are no competing interests justifying the "undue burden" standard of review here as there were in *Casey*.

The *Casey* plurality also found support for its "undue burden" standard in caselaw addressing challenges to facially neutral state laws that have only an indirect effect on a protected constitutional interest. 505 U.S. at 873 ("not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."). In *Lyng v. Castillo*, 477 U.S. 635 (1986) (discussed in Pet. Br. at 23), a challenged food stamp regulation treated parents, children, and siblings who live together as a single household, but did not treat as a single household more distant relatives, or groups of unrelated persons, who live together. The regulation undoubtedly *affected* the family rights of parents, children and siblings by reducing the benefits of needy families and their young children. 477 U.S. at 636. But it did not "'*directly* and *substantially*' interfere with family living arrangements and thereby burden a fundamental right." 477 U.S. at 638 (emphasis added). *See also Maher v. Roe*, 432 U.S. 464, 477 n.10 (1977) (discussing "distinction between direct state interference with a protected activity and state encouragement of an alternative activity . . .").

By contrast, where state action imposes immediate and direct restrictions on family autonomy there is no issue of weighing the respective interests: the challenged restriction is subjected to heightened constitutional scrutiny because it "intrudes on choices concerning family living arrangements."

Moore v. City of East Cleveland, 431 U.S. at 499. Because the city ordinance at issue in *Moore* expressly prohibited cousins from living with their grandmother, the plurality noted that its infringement of protected family autonomy was "*no mere incidental* result of the ordinance." 431 U.S. at 498 (emphasis added). This Court's decisions concerning other fundamental rights similarly distinguish between direct and indirect infringements. Thus, a Social Security regulation that terminated a dependent child's benefits upon marriage did not "interfere with an individual's freedom to make a decision as important as marriage," *Califano v. Jobst*, 434 U.S. 47, 54 (1977), but a state law that prohibited any resident delinquent in child support payments from marrying did. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978).

Grandparents have many means by which to attempt to influence family decisions. It does not denigrate them, or their place in a family, to recognize that the state may not authorize them to commence a lawsuit that the state itself may not bring. Grandparents are part of the "private realm of the family" that the state may not enter without a compelling state interest. When they sue other family members they invoke the power of the state in a manner that directly burdens the family's right to autonomy.

The Washington statutes at issue here are not facially neutral laws that only indirectly interfere with a parent's childrearing decisions. Instead, they operate directly and with the apparent purpose of vetoing a fit parent's otherwise autonomous decision regarding with whom her child will associate and on what terms. Such laws are traditionally subject to strict scrutiny. Their constitutional validity should not be measured by a relativistic balancing test, especially in the absence of a fundamental countervailing governmental interest equal to the state's interest in protecting human life.

2. The Court Orders Considered By The Court Below "Significantly Impair" The Constitutional Right To Family Autonomy.

Even if this Court adopts an "undue burden" standard for analyzing the constitutional validity of court-ordered third party visitation, the proceedings reviewed by the court below substantially infringe parental rights. This case is not about access to grandchildren by grandparents, but about the power to authorize one person to sue another concerning family matters. Lawsuits, however civilly conducted, are ultimately backed by the power of the state to enjoin behavior. Petitioners ignore not only the economic and emotional costs of litigation, significant burdens in their own right, but also the consequences of disobedience - the potential for civil contempt and criminal prosecution.

This Court must reject petitioners' suggestion that the visitation order at issue in their case does not amount to a "substantial infringement" on respondent's parental autonomy because the Wynns were willing to voluntarily allow their children to visit their grandparents. As this Court's Fourth Amendment jurisprudence makes clear, there is a fundamental difference between voluntarily ceding one's personal autonomy and being compelled to do so by the coercive power of the state. *See Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

The economic cost of domestic relations litigation presents a formidable barrier to justice for many Americans. *See generally*, Spangenberg Group, *American Bar Ass'n National Civil Needs Survey: Final Report* (1989). Once the courthouse door is open to "any person" to seek court-ordered visitation "at any time," parents can literally spend their children's educational savings arguing with third parties over what is in their child's best interest. That cost is exacerbated in grandparent visitation litigation, where in most instances the

resources of an older, more financially secure individual are brought to bear against a younger parent who has the costs and responsibilities of childrearing.[25]

The emotional cost of litigation, let alone court-ordered visitation, is no less significant. This Court recognized the "significant intrusion into the parent-child relationship" inherent in adversarial hearings in *Parham*, noting that "[a] confrontation over such intimate family relationships would distress the normal adult parents and the impact on a disturbed child almost certainly would be significantly greater." *Parham v. J.R.*, 442 U.S. 584, 610 (1979). Imposing upon young children the burdens of litigation not only undermines their sense of wellbeing and security, but risks undermining their relationships with the very persons seeking visitation. Goldstein, Solnit and Freud, *The Best Interests Of The Child* 23-25 (rev. ed. 1996).

Third party visitation litigation also forces on a parent the cruel choice of either allowing unsupervised visitation with a person to whom she may have legitimate objections or exposing private family information in a public proceeding, with the serious danger of creating or exacerbating family rifts. Jenifer Troxel conceded at trial that this family's relationship was not normal *because* of this lawsuit, which she had commenced. (RP 57; JA 33a) It is unusual for parents to object to visits between their children and grandparents. When they do, there generally is a reason. Sometimes those reasons are embarrassing, and a "public airing" of them will only "complicate relations between the individuals involved," as petitioners also concede. (Pet. Br.

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[25] *Compare* the median net worth of married couples 55 to 64 years of age ($127,752) *with* female householders 35 years or younger ($1,342) - the respective categories relevant to these litigants when this action was commenced. U.S. Census Bureau, *Asset Ownership of Household: 1993 Highlights*, published June 1999 <http://www.census.gov/hhes/www/wealth/highlite.html> (RA 43-46)

at 6, n.10) A mother should not be put in the position of choosing between the welfare of her children and embarrassment to their grandparents.

As the cases before the Washington Supreme Court demonstrate, visitation orders also go far beyond simply instructing a parent when to make the child available for pickup and return. Tommie Granville Wynn was ordered to consult with the Troxels before discussing family matters with her children, and to notify them of her children's activities. A court decreed how her daughter Isabelle should be addressed. (CP 125, Pet. 77a) Kelly Stillwell was ordered to pay for a "visitation facilitator," and to write down her "parenting rules" for the Smiths' review - and, no doubt, criticism. (Smith CP 17-18) The more contested the proceeding, the more domestic minutiae visitation orders attempt to control. It is precisely this regulation of the "intimacies of daily life" that makes these orders so intrusive. These orders are even more offensive because they are usually unilateral - the parent, who has the continuing right and obligation to raise and support the child, is subjected to severe restrictions. But the individual who seeks and is awarded visitation has no obligation of support - or even to exercise the visitation that has been ordered.

This case graphically demonstrates the immense burden imposed on families by third party visitation actions. The Troxels' insistence on pursuing the litigation could destroy the Wynns' ability to insure that their children can afford to go to college. For this lawsuit was frivolous in the broadest sense of the word - because there was absolutely no need for it. The petitioners' claim embodies an attitude of entitlement that has no place in the domestic life of our society, or of this family. All the Troxels had to do was ask to visit, rather than demand visitation. But because they see "grandparent visitation" as a right, rather than the blessings of extended family life as a privilege, they have caused the Wynns enormous psychic and

economic cost defending the fundamental right of all families not to have the State micro-manage their affairs. By any measure of the consequences of litigation over issues that should be resolved in the heart, not the courts, the orders considered by the court below "significantly impair" the constitutional right to family autonomy.

F. The Washington Supreme Court's Choice Of Remedy Does Not Implicate Federal Law And Is Not A Matter For Review By This Court.

The Washington court properly struck down Washington's third party visitation statute as unconstitutional. Petitioners cannot complain of this choice of remedy. Their contention that the State's *parens patriae* power may properly be brought to bear in the particular facts and circumstances presented by their specific petition is essentially a request that this Court sever the constitutional applications of the statute from its unconstitutional applications. *See* Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 249-50 (1994). But the determination of a state's highest court that it cannot sever unconstitutional applications of a statute from those that pass constitutional muster is binding on this Court as a matter of federalism. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 n.26 (1981) ("Although the ordinance contains a severability clause, determining the meaning and application of that clause is properly the responsibility of the state courts.").

This Court cannot save the statute based on the possibility that petitioners' specific circumstances may be sufficient to overrule a parent's decision concerning visitation. The state court refused to sever permissible applications of the statute from those that interfere with a parent's fundamental rights. In striking down these statutes as unconstitutional, the Washington Supreme Court necessarily determined that a proper statute

would be significantly different than envisioned by the Legislature. *Compare In re Hendrickson*, 12 Wn.2d 600, 123 P.2d 322, 326 (1942) *with Guard v. Jackson*, 83 Wn. App. 325, 921 P.2d 544, 548 (1996), *aff'd*, 132 Wn.2d 660, 940 P.2d 642 (1997). This Court is not free to second guess that issue of state law, nor the remedy chosen by the state's highest court in light of its inability to sever constitutional from unconstitutional applications of the statute.

Nor is petitioners' insistence that the Washington courts be instructed to evaluate the constitutional validity of any third party's visitation request on a case-by-case basis sound as a matter of policy. Under petitioners' view, every visitation dispute will become a constitutional confrontation, as courts wrestle with the issue whether "in the particular circumstances at issue the [court's order] is unconstitutional" as an "undue burden" on parental rights. (Pet. Br. at 7) This Court cannot tell the Washington Supreme Court that it must make the state courts available to tease out defensible applications of this statute from those that cannot pass constitutional muster.

As construed by the state court, the Washington statutes are clear, unequivocal, and allow "any person" to petition for visitation "at any time." By ignoring this construction and limiting its review to these particular parties at this particular time, this Court would merely be trading overbreadth for vagueness, subjecting fit parents to litigation burdens which are themselves an infringement of parental autonomy:

> [A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would

> not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.

Aptheker v. Secretary of State, 378 U.S. 500, 516 (1964). *See* Tribe, *American Constitutional Law* § 12-29 (2nd ed. 1988).

This Court cannot dictate to the Washington Supreme Court the proper remedy when the state court was confronted with a statute that even petitioners concede can be unconstitutionally applied. And even if this Court disagrees and declines to approve the state court's remedy for violation of the federal constitution, it must remand for the state court's determination of the proper remedy under Article 1, Section 7 of the Washington State Constitution.

CONCLUSION

The founders of this country could not have imagined a legal system in which orders for visitation and family management such as those at issue here could be entered and enforced. They did not live in a society where such state control of the family would be tolerated. Neither do we. This Court must let stand the Washington Supreme Court's decision.

RESPECTFULLY SUBMITTED this 13th day of December, 1999.

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No. 99-138

IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF

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I. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF SUBSTANTIVE DUE PROCESS WAS UNSOUND.

The Supreme Court of Washington adopted a single, straightforward constitutional rule -- that the Due Process Clause forbids a state from ordering visitation in favor of a grandparent unless there would, in the absence of such an order, be injury to "the physical or mental health of the child." (Pet.App. 20a). The state statute at issue was declared unconstitutional because the court below believed that advancing the best interests of a child is not of sufficient importance to justify a visitation order.[1]

Respondent's brief does not defend, nor even refer to, the constitutional rule actually adopted by the court below. That brief contains no reference whatever to any requirement of injury to "physical or mental health." Respondent offers two descriptions of the holding of the Washington Supreme Court, neither of which makes any mention of that court's requirement of injury to the physical or mental health of the child. (R.Br. 17, 35).

Respondent's argument for affirmance rests instead on other grounds, raising a variety of new constitutional contentions unrelated to the magnitude or type of harm at

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[1]Respondent asserts that visits with the girls have at all times been available to petitioners; "[a]ll the Troxels had to do was ask to visit." (R.Br. 47). Petitioner's requests were rejected (R.P. 31) and telephone contact was discontinued. (R.P. 190) Requests for visitation went through the lawyers out of respect for the fact that Respondent had a lawyer. (R.P. 33, 36-37) It is petitioners' position that such requests have in fact been rejected. At this point in the proceedings no purpose would be served by spelling out the events which gave rise to this difference.

issue.[2] Respondent's proffered "Restatement of Question Presented for Review" refers only to several of these new arguments, not to the "physical or mental health" standard adopted and applied by the court below. (R.Br. i). Respondent's brief states explicitly what is implicit in its overall structure--that a statute which satisfied these newly articulated objections would be constitutional.[3] The list of safeguards which respondent insists would assure the constitutionality of a statute does not include any requirement of a showing of injury to the physical safety or mental health of the child.[4]

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[2]We discuss the merits of these alternative arguments in part II, infra.

[3] R.Br. 39 ("Respondent does not contend that the states are constitutionally barred from ever granting grandparents, or others who can establish a significant relationship with a child, the right to court-ordered visitation. Indeed, some of the third party visitation statutes adopted and interpreted by the various states protect parental rights--through standing requirements, presumptions, burdens of proof, and recital of specific factors that require a court to consider family autonomy in defining a child's best interest.") Although respondent does not list the statutes of which she approves, no state statute specifically requires evidence of physical or mental harm to the child.

[4]In several passages, respondent suggests that impairment of the best interests of the child is precisely the harm required by the Constitution, so long as that harm is clearly established. R.Br. 7 (state court properly held that parental denial of visitation cannot be interfered with by the state "absent a showing of harm--that is, a showing that the parent is not in fact acting the child's best interest")(emphasis in original), 17 (statute constitutionally defective because it does not place on grandparent the "burden of proving that the parent's decision is not in a child's best interest--that is, that it would harm the child.") Proof that visitation would be in the best interest of a child is proof that the rejection of the grandparents' visitation request was contrary to the best interest of the child.

Respondent's brief does contain several assertions which, if persuasive, might tend to support the holding of the court below. Respondent suggests that under the common law it was "the unanimous practice" of the states to deny visitation requests by grandparents. (R.Br. 21, 42). In our opening brief, we set out common law decisions from ten different states approving just such visitation orders (Pet. Br. 30-31 n.45); respondent does not dispute our characterization of, or even refer to, this well established line of cases. Respondent invokes from past decisions of this Court generally phrased statements regarding the rights of parents. (R.Br. 20-23). Such passages cannot be given force or meaning unrelated to the specific state practice in dispute. None of the quoted passages arose in a case presenting the sort of intra-family problem at issue here.

We earlier noted that the decisions of this Court insist that all affected familial interests must be considered in assessing the constitutionality of a statute alleged to interfere with the interests of any one family member. (Pet. Br. 35-48). Respondent insists, variously, that constitutionally significant familial interests are limited to "psychological parent[s]," persons who are "the functional equivalent of [a] parent" or persons with a "significant relationship with a child." (R.Br. 41, 42)[5]. The various amici which have filed briefs in support of respondent differ emphatically about the constitutionally appropriate definition of a family relationship. On the one hand, the Society of Catholic Social Scientists would recognize only the relationship between a child and his or her biological parents[6], and the American

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[5] The meaning of these formulations is unclear. The petitioner in *Wolcott* had, in fact, lived with the mother and raised the children for four years. Respondent dismisses him as a boyfriend.

[6]Brief Amicus Curiae of the Society of Catholic Social Scientists in

Center for Law and Justice would acknowledge constitutional protection solely for the relationship between a married couple and the children born to them after their marriage.[7] On the other hand, the Lambda Legal Defense and Education Fund argues that constitutional protection should extend to all adults involved in raising a child, without regard to marital status, biological relationship, gender, or sexual orientation.[8] The National Association of Counsel for Children would include all relatives who are living together, as well as other relatives with a "substantial relationship" with a child[9], while the Center for Children's Policy Practice and Research insists that the state should safeguard a child's relationships with all "extended family and unrelated kin" with whom the child may have an "attachment relationship."[10] The quite considerable disagreement about these issues illustrates why this Court should avoid any unnecessary pronouncements regarding the types of familial relationships which the Constitution permits, or requires, a state to respect.

(Cont'd) Support of Respondent, 9.

[7]Brief Amicus Curiae of the American Center for Law and Justice Supporting Respondent, 4, 5, 9.

[8]Brief of Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders as Amici Curiae in Support of Respondent, 4, 9 n.4.

[9]Amicus Curiae Brief [of the National Association of Counsel for Children] in Support of Respondent, 18.

[10]Brief Amicus Curiae Center for Children's Policy Practice & Research at the University of Pennsylvania in Support of Respondent, 10, 20.

At least two amici, enthusiastically embracing the holding of the Washington Supreme Court that parents have a constitutional right to restrict the ideas to which their children are exposed, suggest that that right would indeed extend to controlling what is read or said in a public school.[11] Respondent seeks to avoid this consequence of the decision below by insisting that actions by public school officials cannot violate constitutional rights so long as school attendance is voluntary, and parents are therefore free to home school their children or send them to private schools. (R.Br. 41). But that argument surely proves too much; if adopted by this Court, this approach could vitiate the entire body of constitutional rights now enjoyed by pubic school children, since home schooling and private schools are legal in every state in the union. E.g. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

In our opening brief we noted that respondent had not identified any particular aspect of the visitation order in this case which she claimed was so intrusive as to create a specific constitutional problem. Respondent now identifies three such provisions. (1) "A court decreed how [respondent's] daughter Isabelle should be addressed." (R.Br. 47). This provision was expressly requested by respondent herself; "Isabelle" was the name which respondent had chosen to use, and she successfully sought an order requiring petitioners to utilize the same name.[12] (2) "Tommie

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[11]Brief Amicus Curiae of Christian Legal Society and the National Association of Evangelicals in Support of Respondent, 24-30; see Brief Amicus Curiae of the Society of Catholic Social Scientists in Support of Respondent, 10.

[12]Counsel for Respondent asked for this provision in his opening (Cont'd)

Granville Wynn was ordered to consult with the Troxels before discussing family matters with her children." (R.Br. 47). The decree only requires consultation between the parties about what would be said to the girls about the circumstances of their father's death. Again, this provision was successfully requested by respondent herself, for the purpose of preventing petitioners from discussing that matter with the girls without prior consultation.[13] (3) "Tommie Granville Wynn was ordered . . . to notify [petitioners] of her children's activities." (R.Br. 47). The decree only requires notification regarding extracurricular activities, school plays, open houses, sports events, performances and recitals. (Pet.App. 78a) Respondent's state court appeal from the decree did not object to or even mention this provision; her December 1999 brief in this Court marks the first time in the four year history of this litigation that she has specifically

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(Cont'd)
statement: "This is where the rub is. ... The grandparents are calling Isabelle, Rose. Rose is Isabelle's middle name. Parents call Isabelle, Isabelle and grandparents call Isabelle, Rose. (R.P. 11) see also (R.P. 13, 47, 50, 221). Jenifer Troxel answered "No" to question by Respondent's counsel whether she would object if the court ordered her or if Tommie Wynn [Granville] asked her to never call Isabelle "Rose" again. (R.P. 30)

[13]Respondent's counsel argued during the trial that there was a dispute between the parties about discussing the father's suicide. Respondents' counsel asked for this provision during his opening statement: "This is where the rub is. ...The information we have [sic] the grandparents have talked about the grandchildren's father['s death] without discussing it with the parents, without discussing how they want to handle it." (R.P. 11) See (R.P. 47-49) Respondent's expert testified that to avoid harming the children, the parties should "...make sure there is an agreed upon... position about the [father's] death, ...to have a unified position among adults... use a third person to help them sort it out." (R.P. 82-83) see (R.P. 87-88, 197).

done so.[14]

II. THE ALTERNATIVE GROUNDS FOR AFFIRMANCE ADVANCED BY RESPONDENT SHOULD NOT BE ADOPTED BY THIS COURT

Respondent's brief presents a new wide-ranging list of

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[14]Respondent also asserts that the order in the *Smith* case was overly (Cont'd) intrusive because it provided that the mother was to give the grandparents her parenting rules. Respondent suggests that this provision was included so that the grandparents could then review and criticize those rules. (R.Br. 14, 47).

In fact, this provision was requested by the mother herself in order to assure that the grandparents would conform their own actions to the rules the mother had established. The Guardian ad Litem, Claire Reiner, wrote in her report:

> Ms. Stillwell also objects on the basis that the extended family does not respect her parenting boundaries. It is the Guardian Ad Litem's observation that in fact this is born out in fact. Some of this may be due to the fact that Ms. Stillwell has extremely tightly drawn parental boundaries. For example, she was extremely upset that 3 balloons were given to her child instead of 1. While this might not be where every parent draws their boundary, certainly the fact that Ms. Stillwell draws her boundary there has to be respected by the extended family." (C.P. 57) "The Petitioners should be directed to respond to and obey the parental guidelines for gifts and other conduct of the child whether they particularly agree with that or not..." (C.P. 78)

Respondent also objects that the order in *Smith* included guidelines regarding gifts and telephone calls. (R.Br. 14). This aspect of the order was included at the request of the mother to constrain actions by the grandparents as noted above regarding the number, type and timing of gifts from the Petitioners. The order established times for the parties, including the mother, to call Sarah. (CP 15-16).

purported constitutional defects in RCW 26.10.160(3). Delineating the number of distinct constitutional arguments is difficult, since many of these asserted defects are accorded only an abbreviated analysis, and respondent's constitutional theory is not always spelled out. Overall, respondent appears to contend that RCW 26.10.160(3) has a dozen different defects, each of which would assertedly render it unconstitutional: (1) The statute assertedly does not place on a petitioner the burden of proving that visitation would be in the best interest of the child. (R.Br. 11, 35, 36). (2) The statute assertedly does not require a finding that visitation will in fact be in the best interest of the child. (R.Br. 31). (3) The statute does not require a petitioner to adduce "clear and convincing evidence" that visitation would be in the best interest of the child. (R.Br. 38). (4) In assessing whether visitation is in the best interest of a child, courts are not required to defer to parents' beliefs to the contrary. (R.Br. 29, 32, 37). (5) "Best interest of the child" is too vague a standard to provide a meaningful guidance for the exercise of the trial judge's discretion. (R.Br. 21, 37). (6) The individuals authorized to seek visitation under the statute are not limited to grandparents or others with a substantial preexisting relationship with the child. (R.Br. 21, 32-33). (7) A visitation petition may be filed at any time, and is not limited to the period when a custody proceeding is pending between the parents. (R.Br. 21, 33). (8) After visitation has been awarded, the petitioners may seek modification of that order at any time. (R.Br. 12). (9) Visitation proceedings impose an undue financial burden on the parent. (R.Br. 40, 45-47). (10) Visitation proceedings entail an undue risk of public embarrassment of the parent or petitioning grandparent. (R.Br. 45, 46). (11) In practice, visitation orders invariably involve intrusive micro-management of the parent-child relationship. (R.Br. 16, 40, 47) (12) Parents who violate visitation orders are subject to fines or imprisonment.

(R.Br. 11, 40).

Respondent did not raise any of these issues in the courts below; rather, she there advanced the straightforward but very different contention that a state could not constitutionally order grandparent visitation at all.[15] The only constitutional issue actually decided by the Washington Supreme Court was whether protecting the best interest of a child is a sufficiently important state purpose to justify a visitation order.[16]

Where, as here, a case is before this Court on certiorari to a state court, due respect for the integrity of a state's judicial processes militates against consideration by this Court of wholly new constitutional arguments not raised

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[15]"[']Parents have the responsibility to make decisions . . . for the care and growth of their minor children. ['] . . . Interference with this right and responsibility, is unconstitutional. As a parent, Tommie Granville [Wynn] should have the right to decide when and how grandparent visitation is accomplished. While normally grandparent contact should be encouraged, it is too intrusive for the state to legislate, and for judges to decide based on this legislation, when and how this should occur." Appellant's Supplemental Opening Brief, No. 36737-4-I (Wa.Ct.App. Div. 1), p. 14.

Respondent expressly acknowledges that under the constitutional arguments she now advances in this Court, a state could constitutionally adopt such legislation. (R.Br. 39) A brief on the constitutional issues was also filed in *Stillwell-Smith*. It too raised none of the issues now in Respondent's brief in this court.

[16]The opinion also comments that the statute lacks sufficient safeguards against the filing of "frivolous" lawsuits. (Pet. App. 22a). But the opinion does not hold that this asserted defect rendered the statute unconstitutional. In the court below, respondent emphatically, and in our view correctly, insisted that this part of the opinion did not represent a constitutional holding. Answer to Motions for Reconsideration, No. 65605-3, 7, 9.

in the state courts. Legal arguments do, and often should, evolve during the course of appellate litigation, and the interests of justice would be ill served by the adoption of any rigid exhaustion-like requirement. But where, as here, a litigant effectively abandons the particular constitutional theory on which it prevailed below, and instead offers a dozen new constitutional arguments which the state courts were never accorded an opportunity to consider, this Court should exercise its discretion not to address those new issues. As is true in all the states, court rules in Washington set specific schedules for the filing of briefs; ordinarily those deadlines are intended to fix a time by which litigants are required to set out their basic legal or factual contentions. In the instant case respondent's last brief in the Washington Supreme Court was due on February 6, 1998; additional constitutional issues only raised in a brief filed after that deadline would not have been considered by the state courts. No reason is offered as to why respondent should be allowed to evade that state court deadline by raising numerous wholly new issues for the first time in this Court.

Evaluation of many of respondent's new contentions would require in the first instance an interpretation of state law; in the absence of an authoritative construction by the state's highest court, it will often be impossible to know what constitutional issue, if any, actually needs to be resolved.[17] For example, although respondent seems to assert that petitioners do not bear the burden of proof in visitation

[17]Respondent objects that the Washington Supreme Court was unable to construe the statute in a manner which would "avoid constitutional infirmities." (R.Br. 19). But the only asserted infirmity which was asserted in that court, and thus the only asserted infirmity which the court was unable to avoid by construction, was in the absence of a statutory requirement of injury to the physical or mental health of the child.

proceedings under RCW 26.10.160(3), the Washington Supreme Court has never so held. The general rule in Washington is that the party seeking any judicial decree bears the burden of proof[18]; it would be surprising indeed if RCW 26.10.160(3) were interpreted in any other manner. The parties were clear as to who bore the burden of proof at trial.[19] This is not a case like *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849 (1999), in which a state's highest court refused to construe a statute in a manner which might have resolved a pending constitutional challenge; rather, the instant case is one in which the constitutional objection at issue was never raised in the state court at all.

Similarly, respondent's contention that the "best interests of the child" standard in RCW 26.10.160(3) is impermissibly vague, had it been raised in state court, would have required the Washington courts to construe that phrase. It is exceedingly unlikely that the state courts would have interpreted this phrase in a manner which left trial judges utterly without meaningful guidance as to how to decide these cases. Two other Washington statutes already provide state judges with specific illustrations of what this phrase means.[20] The phrase "best interest of the child" is used in

[18]*Marriage of Sheley*, 78 Wn. App. 494, 503 895 P.2d 850 (1995) *Marriage of Hall*, 25 Wn. App. 530 536, 607 P.2d 898 (1980).

[19] Petitioners acknowledged in opening statement during trial, that they had the burden of proof under the statute. (R.P. 6) Counsel for Respondent also acknowledged this. (R.P. 196)

[20]RCW 26.09.240(6) lists seven specific considerations which would be "relevant to the child's best interest." See Pet. Br. 27a-28a. RCW 26.09.002 states that the best interest of a child is served by arrangements that further the child's "emotional growth, health and stability, and physical care."

literally hundreds of statutes in Washington and the other states, and has been the subject of innumerable state court interpretations. There are some twenty-four other Washington statutes, (Appendix A) and twenty federal laws, (Appendix B) which use this same phrase. The decisions of this Court have repeatedly held that the constitution itself requires that certain determinations be made in the "best interest of the child.[21] Respondent does not contend the phrase is always, or even ordinarily, unconstitutionally vague; to the contrary, respondent apparently concedes that the phrase is sufficiently clear to pass constitutional muster in other contexts, such as regarding custody or visitation disputes between two parents. (R.Br. 27-28)[22]. Under these circumstances it is entirely likely that, had respondent advanced this vagueness objection in the courts below, the Washington courts would have construed RCW 26.10.160(3) in a manner which would have resolved any constitutional problems. By failing to raise this issue in the state courts, respondent deprived them of any opportunity to do so.

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[21]*Bellotti v. Baird*, 443 U.S. 622, 644, (1979); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983); *Lambert v. Wicklund*, 502 U.S. 1169, 1172 (1997); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 873, 970 (1992); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 91 (1976); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 (1989).

[22]The best interest of the child remains the touchstone of custody law in Washington. "In any proceeding between parents under this chapter, the best interest of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002.

If in the instant case, if petitioner, Gary Troxel, had been the girls' father, rather than their grandfather, respondent evidently acknowledges that the best interest of the child standard would have been sufficiently clear to be applied to resolve a visitation dispute.

Many of respondent's new constitutional arguments can only be assessed in the context of other related aspects of Washington domestic relations statutes, laws about which the state courts would be uniquely knowledgeable. For example, respondent contends that RCW 26.10.160(3) is unconstitutional because it requires a parent to air in public potentially embarrassing differences with the petitioning grandparent. Court rule, however, expressly provides that both the files and any hearing in a family law matter may be closed to the public where necessary to prevent such embarrassment. Wash.Gen.R. 15(c)(2)(B). Respondent's brief in this Court makes no mention of this protective procedure, with which state judges would be familiar, and advances no argument suggesting that that process would be insufficient to address any possible constitutional problems.

A number of the new issues raised by respondent could not be resolved without the sort of record that is wholly lacking in the instant case. Respondent contends, for example, that grandparent visitation actions will involve a high degree of economic coercion because the plaintiffs will ordinarily be affluent older couples well able to afford attorneys and experts, while the defendants will be impoverished single mothers. Virtually no empirical information is offered to substantiate this assertion. The actual defendant in this case is a married woman whose household income for 1998 was in excess of $99,000, and she was the only party to present expert testimony.[23] In a substantial majority of the visitation cases that arise after the

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[23]In a financial declaration filed in the Supreme Court of Washington in February, 1998, in support of her request in her Answer for Petition for Review for counsel fees, respondent stated that her monthly household income was $8,304.

death of a parent, the deceased parent is the mother, so the surviving parent and defendant is the father.[24] Washington statutes make specific provision for the possibility that inequality in the resources of the parties will result in unfairness or coercion in family law litigation. An impecunious litigant can obtain, at the very outset of a lawsuit, an award of counsel fees from the opposing party, and fee awards can be made in favor of the losing as well as the prevailing party, where he or she has substantially less income or resources than the opposing party. RCW 26.09.140 and RCW 26.10.080. Respondent does not explain why these generous provisions for counsel fee awards would not be sufficient to resolve the problems which she asserts exist.

Many of the new issues raised by respondent concern the manner in which a determination would be made regarding whether visitation is in the best interest of a child. But in this case that underlying question simply was not in dispute. At the very beginning of the hearing, counsel for respondent stated on the record, "[W]e'd like to say that our position is that grandparent visitation is in the best interest of the children." (J.App. 31a). In light of that stipulation, it is impossible to understand how it would matter in this case which party would have had the burden of proof on this issue, whether deference was owed to respondent's views, whether a heightened standard of proof should have been applied, or whether there is ambiguity in the phrase "best interest of the child."[25] No decision on such constitutional

[24]Pet. Br. App. B (in 83 of 140 cases involving one dead parent, the deceased parent was the mother).

[25]Similarly, one of respondent's own experts expressly agreed that the visitation dispute should be resolved based on "what is in the best interests of the children." (R.P. 72). "...an appropriate grandparent (Cont'd)

questions would affect the outcome of the instant case.

The same is true of many of respondent's new constitutional arguments. Although respondent objects that in theory a total stranger might sue under RCW 26.10.160(3), the actual petitioner in this case was the girls' grandparents. While respondent complains that visitation orders are subject to modification at any time, no such modification was ever sought by petitioners during the three years that the disputed visitation order was in effect. It is true, as respondent notes, that in theory under Washington law violations of domestic relations orders could result in contempt citations and punishment, but respondent does not claim that she ever violated, or was even alleged to have violated, the order in this case. Respondent insists that her views on the best interests of the children should have been given deference by the trial judge; in fact, the trial judge explained that he had done just that.[26]

(Cont'd)
grandchild visitation is one that is aimed at what the child's needs are, and that those needs are primary." (R.P. 70)

[26] R.P. 214-215. The particular provision of the visitation order to which respondent specifically objected in the courts below was the authorization of overnight visits. If respondent had testified at trial, based on her personal knowledge of the maturity and sensitivities of the two girls, that they were not ready to spend nights away from home, and had explained why they were unable to do so despite having stayed at petitioner's home when they were even younger, we assume the trial judge would have attached considerable weight to her views. But respondent never testified about this factual issue at all. Rather, she based her opposition to overnight visits solely on proffered expert testimony that all children of the girls' ages are too young to stay overnight away from their home, testimony that offered no account of the fact that these children had in fact done so for several years prior to their father's death. (R.P. 160)

Respondent insists that in the resolution of visitation disputes deference should be paid to parental views about the best interests of the child. That might raise a significant constitutional question in a case in which both parents believed that visitation was contrary to the interest of the child. But in this case it is undisputed that the girls' father, while he was alive, believed that it would be in their interest to visit regularly with their paternal grandparents. Respondent does not explain why the same constitutional principle which, on her view, would once have required deference to Brad Troxel's beliefs about the best interests of the girls could now forbid any consideration of those very beliefs. Whatever the merits of respondent's insistence that the Constitution requires deference to parental views, that argument cannot provide a basis for attacking the visitation order in a case such as this.

Respondent apparently maintains that she is entitled to a decision forbidding the application to her of RCW 26.10.160(3) if she can show that some imaginable application of that statute to other persons in other circumstances would be unconstitutional.[27] But respondent can prevail only if she demonstrates either that the statute is unconstitutional as applied to her, or that the law is facially unconstitutional because it would be invalid in all or almost all cases. Respondent has met neither burden. The fact that this case originated in state courts does not alter that requirement. If a statute does not fail the constitutional standard for facial invalidity, it simply is not facially invalid under the United States Constitution. A state court could

[27]Respondent does not make a persuasive showing that such other circumstances are widespread; she does not, for example, identify a single case in which a stranger has ever sought visitation rights under any of the statutes that have been in effect for the last several decades.

hold that a statute is facially invalid under the state constitution merely because it would be invalid in occasional or even unlikely circumstances, but that would be an application of state constitutional law. Insofar as a state court purports to be applying the federal constitution, it is constrained to use federal Constitutional standards.

Relying on two sentences in a footnote to the opinion of three members of this Court in *City of Chicago v. Morales*, 572 U.S. 41, 119 S.Ct. 1849 (1999), respondent insists that state courts are not constrained by the prudential standing doctrine of jus tertii. (R.Br. 18). Regardless of whether that passage may command the support of a majority of this Court, it is irrelevant to the instant case. First, the jus tertii doctrine has no bearing here. That principle generally bars one party from bringing an action because it has been injured by a violation of the rights of a third party. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Even if RCW 26.10.160(3) would be unconstitutional if applied to some other individual, a visitation order concerning the unidentified children of some unknown parents could not possibly cause injury to respondent herself. Absent such actual injury, respondent lacks Article III standing to litigate the wide variety of new issues raised in her brief. Second, the Washington Supreme Court did not purport to disregard jus tertii problems in resolving in respondent's favor the now proffered alternative grounds for affirmance; rather, that court simply did not resolve those proffered grounds at all.

The numerous amicus briefs that have been filed in this case articulate a wide variety of concerns about the manner in which any decision by this Court might affect family law issues far removed from the specific question of grandparent visitation. Nothing in our briefs should be understood to minimize the importance of those concerns, or

to suggest that in other contexts they might not pose substantial constitutional questions. Procedural due process might well be violated by a judicial process so formalized or expensive that it has the effect of denying indigent litigants a meaningful opportunity to be heard. The failure of a state to protect women from domestic violence, for example, would implicate the very core of the original meaning of the Equal Protection Clause.[28] The evolving response of the states to non-traditional parenting and domestic relationships raises issues of considerable sensitivity and complexity which the Constitution requires be resolved in a manner untainted by irrational or gender-based or other irrational prejudices. The quite specific constitutional question raised by the instant case can and should be determined in a narrow manner, leaving for another day consideration of the other broader constitutional issues identified by amici.

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[28] *Brzonkala v. Morrison*, (U.S. Docket No. 99-29), Violence Against Women Act of 1994, 108 Stat. 1916, 42 USC § 13931 et.seq.

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APPENDIX

APPENDIX A –WASHINGTON STATE STATUTES USING "BEST INTEREST" PHRASE

RCW 13.34.100 Appointment of guardian ad litem--Background information-- Rights--Appointment of counsel for child--Review

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18 U.S.C. § 3524 CRIMES AND CRIMINAL PROCEDURE PART II--CRIMINAL PROCEDURE CHAPTER 224--PROTECTION OF WITNESSES § 3524. Child custody arrangements

25 U.S.C. § 1916 INDIANS CHAPTER 21--INDIAN CHILD WELFARE SUBCHAPTER I--CHILD CUSTODY PROCEEDINGS § 1916. Return of custody

28 U.S.C. § 1738A JUDICIARY AND JUDICIAL PROCEDURE PART V--PROCEDURE CHAPTER 115--EVIDENCE; DOCUMENTARY § 1738 Full faith and credit given to child custody determinations

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(5)

No. 98-138

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IN THE

Supreme Court of the United States

JENIFER TROXEL, et vir,

Petitioner,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF OF THE *AMICUS CURIAE* AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

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INTEREST OF *AMICUS CURIAE*

The American Academy of Matrimonial Lawyers ("AAML") respectfully submits this brief as *amicus curiae* pursuant to Rule 37.3 of the Rules of this Court.[1]

The AAML was founded in 1962 to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be preserved. It has more than 1,500 fellows in 48 states.[2] To attain fellowship in the AAML, the attorney must have met requirements as to length of practice, percentage of their practice dedicated to matrimonial law, be recognized by the bench and bar as an expert and ethical practitioner, must have substantial trial experience in matrimonial litigation with consideration given to the ability to achieve settlement without the necessity of trial and pass a written examination. Fellowship in the AAML represents both a recognition of achievements in family law and a commitment to the highest standards of practice in the field.

The AAML has devoted substantial resources to children. The Academy's Special Concerns Of Children Committee established Standards for Attorneys and Guardians-Ad-Litem in Custody or Visitation Proceedings, promulgated a Model Relocation Statute to bring greater

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or counsel, have made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37 of the Rules of this Court, the parties consented to the filing of this brief, and copies of the consent have been filed with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the AAML. No inference should be drawn that any judicial member of the AAML has participated in the adoption or endorsement of the position of this brief. The brief was not circulated to any member of the judiciary who was a member of this organization prior to filing.

consistency in the area of a parent wishing to relocate the residence of a child, produced a video entitled "The Voices Of Children Of Divorce," to assist parents in understanding the emotional turmoil that a child goes through in a child custody dispute, and published a manual entitled "Stepping Back from Anger," which includes the Children's Bill of Rights[3] which were approved by the Board of Governors of the AAML.

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[3] **CHILDREN'S BILL OF RIGHTS**

Every kid should know he or she has rights, particularly when their mom and dad are splitting up. Below are some things parents shouldn't forget - and kids shouldn't let them - when the family is in the midst of a break-up.

You have the right to love both your parents. And you have the right to be loved by both of them. That means you shouldn't *feel guilty* about wanting to see your dad or your mom at any time. It's important for you to have both parents in your life, particularly during difficult times such as a divorce.

You do not have to choose one parent over the other. If you have an opinion about what parent you want to live with, let it be known. But nobody can force you to make that choice. If your parents can't work it out, a judge may make the decision for them.

You're entitled to all the feelings you're having. Don't be ***embarrassed by*** what you're feeling. It's scary when your parents break up, and you're allowed to be scared. Or angry. Or sad. Or *whatever.*

You have the right to be in a safe environment. This means that nobody is allowed to put you in danger, *either* physically or emotionally. If one of your parents is hurting you, tell someone - either your other parent or a trusted adult, like a teacher.

You don't belong in the middle of your parents' break-up. Sometimes your parents may get so caught up in their own problems that they forget that you're just a kid, and that you can't handle their adult worries.

Grandparents, aunts, uncles and cousins are still part of your life. Even if you're living with one parent, you can still see relatives on your other parent's side. You'll always be a part of their lives, even if your parents aren't together anymore.

The AAML Special Concerns of Children Committee is currently studying the issue of children's rights to a continued relationship with third parties.[4] No final position has been adopted by the AAML. The AAML Board of Governors at its November 4, 1999, meeting in Chicago, Illinois, adopted the following statement of interest in this pending case:

> The AAML supports the concept that, under proper circumstances, a child should have access to a relationship with a non-parent and a non-parent should have the right to intervene to seek to maintain a relationship with the child.
>
> Any statute permitting such intervention must meet constitutional requirements establishing threshold criteria for intervention and criteria supporting that the intervention is in the best interests of the minor child – the Washington statute does not meet these requirements.

One of the Children's Bill of Rights as promulgated by the AAML and initially created by its Special Concerns of Children Committee is "Grandparents, aunts, uncles and cousins are still part of your life. Even if you're living with one parent, you can still see relatives on your other parent's side. You'll always be a part of their lives, even if your parents aren't together anymore." As the "Stepping Back from Anger" manual suggested: "Imagine you're six, and suddenly the only people you have ever relied on for food, shelter, and love are at each other's throats. In your young mind, you conclude that you are the cause of their anger, and

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You have the right to be a child. Kids shouldn't worry about adult problems. Concentrate on your school work, your friends, activities, etc. Your mom and dad just need your love. They can handle the rest.

[4] Professor Martin Guggenheim, New York University School of Law is the Committee's Reporter for this project.

that you might get lost in the shuffle. Before you know it, you think to yourself, there won't be anybody left to scare off the closet monsters."

The AAML promulgated Bounds Of Advocacy, aspirational standards of conduct, that addresses a Fellows' obligation to children as follows:

> 2.23 In representing a parent, an attorney should consider the welfare of the children.

This case raises critical issues regarding children's rights to continued access with non-parents. These issues are substantially important to the AAML.

STATEMENT OF THE CASE

Amicus Curiae, the American Academy of Matrimonial Lawyers, makes no comment on the statement of the case.

SUMMARY OF ARGUMENT

The American Academy of Matrimonial Lawyers submits this *Amicus* brief to advance the interest of children who would benefit by having the right to maintain their relationship with a non-parent.

The Court must balance the competing constitutional rights of the parents' right to control the details of their children's upbringing with the fact that children are persons within the meaning of the 14th Amendment, with their own liberty and privacy interests. The challenged statute lacks any specificity and does not protect the family's right to avoid being penetrated in the absence of a sufficient justification for a court to order a trial on the issue of a third party's access. A more carefully drawn statute would be constitutional, provided it required a court to bifurcate the inquiry. The statute should require that the court first determine whether the third party had demonstrated a sufficient relationship to

the child, and that the child's right to retain that relationship could be sufficient to override parental discretion.

ARGUMENT

BECAUSE THIRD-PARTY ACCESS STATUTES INTRUDE UPON FUNDAMENTAL CONSTITUTIONAL RIGHTS, THEY MUST BE MORE CAREFULLY DRAWN THAN THE CHALLENGED STATUTE IN THIS CASE

The family has long been protected against untoward intervention by the state. There is no question that legislation authorizing judges to force parents to make their children available to visit non-parents hampers fundamental liberty and privacy interests protected by the Due Process Clause of the Fourteenth Amendment. In particular, parents enjoy the right to control the details of their children's upbringing, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 230-34 (1972), and families enjoy a right to familial privacy, *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), and liberty, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

As this Court has said:

> The absence of dispute [concerning the fundamental nature of the parent-child bond] reflect[s] this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.

Santosky v. Kramer, 455 U.S. 745, 753 (1982). *See also Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

At the same time, children are "persons" within the meaning of the Fourteenth Amendment, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969), with their own liberty and privacy interests, *In re Gault*, 387 U.S. 1 (1967); *Bellotti v. Baird*, 443 U.S. 622 (1979). These interests sometimes will override a parent's interests to make parental decisions affecting them, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

This mixture of rights means that occasionally state action that impedes parental decision making will be tolerated when it furthers a child's independent constitutional rights. Deciding when state action is permissible in these circumstances raises "complex and novel questions." *Smith v. Organization of Foster Families, supra*, 431 U.S. at 847. *See also Wisconsin v. Yoder, supra*, 406 U.S. at 231-32. A properly drawn third-party access statute would have to balance these rights to protect both the parent's and the child's legally protected interests.

When balancing competing constitutional rights, one might be inclined to err on the side of enhancing outcomes that are likely to further a child's rights, particularly when judges are empowered to order visitation only when they determine it would further a child's "best interests."

The American Academy of Matrimonial Lawyers has extensive experience litigating family disputes in state courts throughout the United States. One thing is quite clear from that experience: the costs, both financial and emotional, associated with prosecuting or defending lawsuits involving intimate details of the family are very considerable. They are commonly traumatic events for many parents, having devastating impacts on them and on their ability to parent. Scholars have long recognized that the impact of a lawsuit over visitation on the stability of a child's environment can be extremely detrimental. Joseph Goldstein, Anna Freud and Albert Solnit, co-authors of several influential books on child development theory and its relation to custody law, would

prohibit jurisdiction even to *consider* visitation, unless and until a third party could demonstrate that the case falls within the narrow range of cases where intervention is appropriate. As those authors state it:

> Children . . . react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control. . . . At no stage should intrusion in the family [which the authors define as conducting a hearing] be authorized unless probable cause for the coercive action has been established in accord with limits prospectively and precisely defined by the legislature.

JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 25 (1979).

As one commentator has written:

> It is clear from the psychological literature that a lawsuit over visitation rights, with its accompanying intrusions by psychological experts and lawyers, and its inevitable disruption of the nuclear family, often creates extreme anxiety and dislocation for a child.

Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 124 (1986) (citations omitted).

We believe the Constitution requires a carefully calibrated third-party access statute, wherein courts must first find "standing" before forcing litigants to conduct an evidentiary hearing. At the same time, we believe that children who have formed significant relationships with non-parents (including grandparents, other relatives and even non-relatives) have the right not to suffer an arbitrary veto at the

hands of their parents by cutting off an important relationship based on considerations having nothing to do with the child's interests.

The challenged statute is deficient because it gives standing to "any person" to sue for access to a parent's child. It is also deficient substantively because it fails to provide judges with sufficient boundaries for ascertaining when forcing parents to allow their children to visit non-parents furthers a legitimate state interest. It is inadequate to require only that judges conclude that visitation would be in the child's "best interests." *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), quoting *Smith v. Organization of Foster Families*, 431 U.S. at 862-63 (1977) (Stewart, J. concurring); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion). Scholars have long debated what constitutes the best interests standard. The standard has been challenged as being too open-ended, too indeterminate, and too value-laden. *See, e.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Function in the face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 257 (Summer 1975). Instead, courts should determine whether or not the parent's decision to disallow access to the third party is an arbitrary choice unrelated to the child's interests. There should be threshold criteria for intervention and criteria supporting that the intervention is in the best interests of the minor child. Thus, for example, where courts find that the child would suffer a substantial loss if contact between the third party and the child were barred and where courts find that the parent's opposition to such access is an arbitrary interference with the child's right to continue contact, courts should be empowered to order such continued contact.

For these reasons, we urge that the Washington statute be declared unconstitutional because it requires parents to defend their parental prerogatives in all cases whenever "any person" chooses to sue them and because it authorizes courts to order third-party access whenever they conclude that access would further the child's "best interests." The challenged

statute lacks any specificity and does not protect the family's rights to avoid being penetrated in the absence of a sufficient justification for a court to order a trial. It is also too broad because it empowers courts to override parental decisions in the absence of a sufficient state interest to do so.

We submit that a more carefully drawn statute would be constitutional provided it required a court to bifurcate the inquiry. The statute should require that the court first determine whether the third party had demonstrated a sufficient relationship to the child, and that the child's right to retain that relationship could be sufficient to override parental discretion. Once a court finds such standing, there would be a legitimate state interest in forcing parents to defend their decision to sever the relationship between the child and the third party. Finally, a court should be allowed to override a parent's decision once it found the decision to be an arbitrary veto of the child's right to maintain the relationship.

For these reasons, we urge this Court to declare the Washington third-party access statute unconstitutionally overbroad but preserve the question for a future case whether a carefully drawn third-party access statute would be constitutional.

CONCLUSION

For the reasons set forth herein, the American Academy of Matrimonial Lawyers respectfully requests that the Court affirm the decision below and find that under proper circumstances, a child should have access to a relationship with a non-parent and a non-parent should have the right to intervene to seek to maintain a relationship with the child and that a statute permitting this intervention must meet constitutional requirements establishing threshold criteria for intervention and criteria supporting that the intervention is in the best interest of the minor child.

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IN THE SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE VISITATION OF
NATALIE ANNE TROXEL AND
ISABELLE ROSE TROXEL, MINORS.

JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF THE STATES OF WASHINGTON, ARKANSAS, CALIFORNIA, COLORADO, HAWAII, KANSAS, MISSOURI, MONTANA, NEW JERSEY, NORTH DAKOTA, OHIO, AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICI

Amici, the State of Washington and eleven additional states, submit this brief. Statutes authorizing actions for child visitation by parties who have significant and beneficial relationships with minor children, but who are not their natural parents or legal custodians, are nearly universal in state law.[1]

The states have a significant interest in the welfare of children who reside within their borders. Third-party visitation statutes, such as Washington's, protect the well-being of children by affording persons who are not the natural parent or legal custodian of a child an opportunity to prove that some limited contact with the child is in the child's best interests. Such statutes constitute reasonable and minimally intrusive action by the states to advance the welfare of children. They

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[1] State statutes vary with respect to the circumstances under which visitation may be sought and the persons entitled to seek it. In some states, visitation may be sought only when the child's custody is at issue or when a natural parent has died. In some states, visitation may be sought only by persons related to the child by blood, such as grandparents. In other states, both or neither of these restrictions apply. *See, e.g.*, Ala. Code 30-3-4.1; Alaska Stat. 25.20.065, 25.24.150; Ariz. Rev. Stat. 25-409; Ark. Code. Ann. 9-13-103; Cal. Fam. Code 3102, 3104; Cal. Fam. Code App. 197.5; Colo. Rev. Stat. 19-1-117; Conn. Gen. Stat. Ann. 46b-59; Del. Code Ann. tit. 10, § 1031; Fla. Stat. Ann. 752.01; Ga. Code Ann. 19-7-3; Haw. Rev. Stat. Ann. 571-46.3; Idaho Code 32-719; Ill. Comp. Stat. 5/607; Ind. Code Ann. 31-17-5-1; Iowa Code Ann. 598.35; Kan. Stat. Ann. 38-129; Ky. Rev. Stat. Ann. 405.021; La. Rev. Stat. Ann. 1267, 1269; Maine Rev. Stat. Ann. tit. 19-A, § 1803; Md. Code Ann., Family Law 9-102; Mass. Gen. Laws Ann. ch. 19, § 39D; Mich. Comp. Laws Ann. 722.27b; Minn. Stat. Ann. 257.022; Miss. Code Ann. 93-16-3; Mo. Ann. Stat. 452.402; Mont. Code Ann. 40-9-102; Neb. Rev. Stat. 43-1802; N.H. Rev. Stat. Ann. 458:17d; N.J. Stat. Ann. 9:2-7.1; N.M. Stat. Ann. 40-9-2; N.Y. Dom. Rel. Law 72; N.C. Gen. Stat. 50-13.2; N.D. Cent. Code 14-09-05.1; Ohio Rev. Code Ann. 3109.051, 3109.11, 3109.12; Okla. Stat. Ann. tit. 10 § 5; Or. Rev. Stat. 109.119, 109.121; Pa. Cons. Stat. Ann. 5311; R.I. Gen. Laws 15-5-24.1, 15-5-24.2, 15-5-24.4; Tenn. Code Ann. 36-6-307; Tex. Fam. Code Ann. 153.433; Utah Code Ann. 30-5-2; Vt. Stat. Ann. tit. 15, §§ 1011, 1012; Va. Code Ann. 16.1-241, 16.1-278.15; W. Va. Code 48-2B-1, 48-2B-3; Wis. Stat. Ann. 767.245; Wyo. Stat. Ann. 20-7-101.

satisfy due process and should stand. Because this case considers the constitutionality of such statutes, amici offer this brief.

SUMMARY OF ARGUMENT

The decision below, invalidating Washington's third-party visitation statutes under the due process clause of the Fourteenth Amendment, concludes that a parent has a fundamental right to preclude a child from having contact with persons other than another parent, regardless of the circumstances, and in the face of a judicial determination that such contact is in the best interests of the child.

This conclusion is at odds with decisions of this Court. It overstates the constitutionally protected interests of parents with respect to their minor children and understates the permissible bases upon which government may act to promote the welfare of children and the public welfare.

Parental autonomy is not absolute. Decisions of this Court, recognizing fundamental parental rights, have been concerned with interests at the core of parental liberty. Thus, the Court has found a fundamental parental right in continuation of the parent-child relationship and in directing the religious upbringing of children. However, none of the decisions of this Court, considered in context, stand for the proposition that parents have a broad-based fundamental right to direct all aspects of their children's lives, free from reasonable governmental regulation that promotes the child's welfare.

The fundamental constitutional rights of parents do not encompass the right to preclude a child from having contact with persons other than another parent or legal custodian, when it has been established before a neutral judicial tribunal that such contact is in the best interests of the child.

Moreover, even if it were assumed that parents have a broad-based fundamental right to autonomy in child-rearing, Washington's visitation statutes do not unduly burden that

right. Parents have a full opportunity to be heard in actions seeking visitation under Washington's statutes. The rights and interests of parents, as well as those of their children, must be taken into account in such proceedings. The minimal intrusion of visitation is authorized only when it has been established before a neutral decision-maker that visitation is in the best interests of the child. Washington's visitation statutes thus satisfy due process.

ARGUMENT

1. Washington's Statutes Authorize Visitation Only When A Petitioning Party Establishes In Court Proceedings That Visitation Is In The Best Interests Of The Child

A. The Statutes

The Troxels sought visitation with their grandchildren, the minor daughters of their deceased son, under Washington statutes authorizing third parties to maintain an action seeking child visitation. At the time the Troxels filed their petition for visitation in December 1993, two Washington statutes authorized third parties to file petitions seeking visitation with a child – Wash. Rev. Code 26.09.240 and 26.10.160(3); 1989 Wash. Laws ch. 375, § 13 and 1989 Wash. Laws ch. 326, § 2(3). The challenged statutes authorized the court to grant visitation when visitation would be in the best interests of the child. The statutes also authorized the court to modify an order granting or denying visitation whenever modification would serve the best interests of the child. 1989 Wash. Laws ch. 375, § 13; 1989 Wash. Laws ch. 326, § 2(4).

B. The "Best Interests" Standard

The "best interests of the child" standard is a touchstone in numerous state law determinations relating to children. It is a standard familiar in Washington. Whether a particular course is in the best interests of the child requires a case-specific examination of all factors that bear on the well-being of the child, in the context of the particular inquiry

before the court. *In re the Dependency of J.B.S.*, 123 Wash. 2d 1, 11, 863 P.2d 1344 (1993).

The "best interests" standard has as its ultimate goal the welfare of the child, but its focus is far broader than the child. By virtue of the nature of childhood, the best interests of a child are inextricably intertwined with the rights and interests of others. Of necessity, a child's best interests must take into account the rights, interests, and circumstances of those persons legally responsible for the child, including the child's parents and those who play a significant role in the child's life. *In re the Welfare of Becker*, 87 Wash. 2d 470, 478, 553 P.2d 1339 (1976) ("[T]he courts have broad discretion and are allowed considerable flexibility to receive and evaluate all relevant evidence in reaching a decision that recognizes both the welfare of the child and parental rights.")

Such considerations are explicit in the current version of Washington's statute relating to third-party visitation petitions in dissolution or separation proceedings.[2] Wash. Rev. Code 26.09.240 provides that in determining the child's best interests the court may consider:

> "(a) The strength of the relationship between the child and the petitioner;
>
> (b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;
>
> (c) The nature and reason for either parent's objection to granting the petitioner visitation;

[2] Wash. Rev. Code 26.09.240 was amended in 1996, after the petition for visitation was filed in this case. *See* 1996 Wash. Laws ch. 177, § 1.

> (d) The effect that granting visitation will have on the relationship between the childand the child's parents or the person with whom the child is residing;
>
> (e) The residential time sharing arrangements between the parents;
>
> (f) The good faith of the petitioner;
>
> (g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and
>
> (h) Any other factor relevant to the child's best interest." Wash. Rev. Code 26.09.240(6) (1996 Wash. Laws ch. 177, § 1).

Similar nonexclusive factors are recognized in decisions from other states where statutes authorize third-party visitation, when such visitation would be in the best interests of the child. *See, e.g.*, *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121, 126-27 (1993) ("The trial court must concern itself solely with the welfare and prospects of the child. In so doing, the court should assess in their totality all relevant factors and circumstances pertaining to the grandchild's best interests. These would include, but not be limited to: the nature and stability of the child's relationships with its parents; the nature and substantiality of the relationship between the child and the grandparent, taking into account frequency of contact, regularity of contact, and amount of time spent together; the potential benefits and detriments to the child in granting the visitation order; the effect, if any, grandparental visitation would have on the child's attachment to its nuclear family; the physical and emotional health of the adults involved; and the stability of the child's living and schooling arrangements."); *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478, 482-83 (1985); *In re Whitaker*, 36 Ohio St. 3d 213, 522 N.E.2d 563(1988).

2. A Parent Does Not Possess A Fundamental Right To Preclude A Child From Having Contact With Persons Other Than Another Parent, Regardless Of The Circumstances And In The Face Of A Judicial Determination That Such Contact Is In The Best Interests Of The Child

In a 5-4 decision, the Washington Supreme Court concluded that a parent has a fundamental liberty interest in determining whether his or her child may have visitation with a third party who is not the child's parent. According to the court below, this fundamental right precludes the state from establishing a process whereby persons who seek visitation with a child may secure visitation by demonstrating that such contact is in the best interests of the child. In so holding, the court below effectively ruled that a parent may deprive a child of any contact with a non-parent, regardless of the basis for the parent's decision, regardless of the child's circumstances, regardless of the relationship between the non-parent and the child, and regardless of whether visitation would be in the best interests of the child. The majority below reached this conclusion by relying on selective phrases from decisions of this Court, without regard to their holdings. Pet. Writ Cert. at 12a-13a.

To be sure, parsed phrases and passages from opinions of this Court, void of context, can be read to suggest near absolute autonomy in parental decision-making. However, when the statements of this Court in each of these cases are considered in context, it becomes apparent that the scope of fundamental parental liberty is more narrow than that determined by the Washington Supreme Court and that the specific right asserted in this case is not encompassed by it.

A. Certain Core Aspects Of Parental Liberty Rise To The Level Of Fundamental Rights

In *Stanley v. Illinois*, 405 U.S. 645 (1972), quoted extensively by the court below, this Court considered a statute that extinguished the parent-child relationship between unwed fathers and their children upon the death of the children's natural mother. The statute did so without a hearing concerning the parental fitness of the father. Under the challenged statute, the children became wards of the state, and the father lost all legal right to companionship, care, and custody of his children.

It is in this context that the Court stated the "private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection" and noted that the "rights to conceive and raise one's children have been deemed essential". *Stanley*, 405 U.S. at 651. The interest at issue in *Stanley* was the survival of any legally protected relationship between a father and his child. Neither the decision nor the oft-quoted passages from it signal that parents are free from reasonable state regulation in all decision-making with respect to their children.

The same is true of *Santosky v. Kramer*, 455 U.S. 745 (1982), quoted by the court below. *Santosky* considered a state law that forever cut off all legal rights of parents with respect to their children. At issue in *Santosky* was the constitutionally required burden of proof in proceedings to terminate parental rights for permanent child neglect. A New York statute allowed termination on a showing of permanent neglect by a "fair preponderance of the evidence". *Santosky*, 455 U.S. at 745. *Santosky* simply stands for the proposition that "[b]efore a state may sever completely and irrevocably the rights of

parents in their natural child", due process requires the state to prove its allegations by clear, cogent, and convincing evidence. *Id.* at 746.

It is not surprising that in the context of deprivation of all parental rights, the *Santosky* Court recognizes the parent's right to the companionship, care, custody, and management of his or her children as a fundamental liberty interest. *Id.* at 758-59. But again, *Santosky* neither holds nor suggests that parents have a fundamental liberty interest to be free from reasonable state regulation in directing all aspects of their children's lives.

Two other decisions of this Court, relied on by the court below, invalidated statutes because they interfered with the free exercise of religion under the First Amendment.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court sustained a challenge to a state law requiring children to attend public school beyond the eighth grade. The challenge was brought by parents of Amish children who contended that the law infringed on their freedom of religion. *Yoder* did not present a claim based on the Fourteenth Amendment, as is the claim in the instant case. Rather, *Yoder* concerned free exercise of religion under the First Amendment. *Yoder*, 406 U.S. at 207, 214.

Similarly, *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925), relied on by the court below, does not support the notion that parents have a fundamental liberty interest in all aspects of raising their children, that is free from reasonable government regulation. Like *Yoder*, *Pierce* implicated freedom of religion. *Yoder*, 406 U.S. at 233 ("However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.").

Pierce considered whether a statute requiring children between the ages of 8 and 16 to attend public school impermissibly infringed on the liberty of parents to educate

their children in parochial or military schools. In invalidating the statute, the Court observed:

> "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce*, 268 U.S. at 534.

That *Pierce* does not embrace the sweeping parental liberty interest announced by the court below is further made evident in *Yoder*, where the Court explained:

> "*Pierce*, of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State." *Yoder*, 406 U.S. at 233.

Thus, *Yoder* and *Pierce* speak to the right of parents to raise their children in a particular faith or on a particular moral path. These cases do not suggest that the state must defer to parental decision-making in all matters that bear on the welfare of children.

The final decision of the Court relied upon by the majority below is *Meyer v. Nebraska*, 262 U.S. 390 (1923). At issue in *Meyer* was a statute making it a crime to teach a foreign language to any child who had not completed the eighth grade. The statute was challenged by a parochial school teacher who had been convicted under its terms. The teacher claimed that his right to teach and the right of parents to engage

him to teach were within the liberty interests protected by the Fourteenth Amendment and that the statute unlawfully infringed on those rights. The *Meyer* Court concluded that the liberty protected by the due process clause included the right "to engage in any of the common occupations of life" and the right to "establish a home and bring up children". *Meyer*, 262 U.S. at 399. The Court went on to explain:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer*, 262 U.S. at 399-400.

The Court invalidated the statute at issue precisely because it determined the statute to be "arbitrary and without any reasonable relation to any end within the competency of the state". *Id.* at *403*. In this respect, the Court noted that the statute applied only to modern languages and, thus, would not support its claimed purpose of protecting the health of children by limiting their mental activities. The Court further expressed concern that the statute hindered proficiency in a foreign language by precluding its study at an early age, a consequence inconsistent with state-acknowledged benefits of education. *Id.* In *Meyer* then, the Court did not measure Nebraska's legislation against the strict scrutiny standard that applies when state action substantially infringes on a fundamental right.

Thus, none of these cases stand for the proposition that a parent invariably has a fundamental liberty interest in all decision-making relating to his or her child. Rather, these cases indicate is that there is a core of parental liberty with respect to child-rearing that encompasses interests so essential to individual liberty that the state may not infringe upon them, absent a compelling interest and an approach narrowly tailored to that interest. While not fully defined, this core of liberty interests includes maintaining the legal relationship between

parent and child. Before the state may terminate this legal relationship, due process demands a substantial showing that termination is necessary to protect the child from serious harm. Also within the core of this liberty are parental decisions concerning the religious upbringing of their children. Indeed, where fundamental liberty interests explicit in other constitutional provisions, such as the free exercise clause, coincide with parental decision-making, the state is not allowed to intrude, absent a compelling interest and a narrowly tailored approach. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), invalidating a requirement that children attending public school salute the American flag.

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard." *Barnette*, 319 U.S. at 639.

But beyond this core of parental liberty, the state has a legitimate role to play in advancing the welfare of children and the public welfare by rational means. "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). In *Prince*, this Court recognized that "[a]cting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." *Id.* at 166 (footnotes omitted). "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[.]" *Id.* at 167; *see also Ginsberg v. New York*, 390 U.S. 629, 640 (1968) ("The state

also has an independent interest in the well-being of its youth.").

Indeed, *Yoder* and *Pierce* sanction state regulation requiring parents to comply with educational standards for their children, at least where those standards do not impermissibly intrude on the free exercise of religion. And *Meyer* makes it clear that such state regulation passes constitutional scrutiny if it is reasonably related to legitimate state interests.

B. The Interest Asserted In This Case Is Not A Fundamental Aspect Of Parental Liberty

That parental decision-making does not invariably rise to the level of a fundamental liberty interest is consistent with the approach of this Court in considering claims that certain rights are fundamental. The Court requires "a 'careful description' of the asserted fundamental liberty interest". *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Court then considers whether the specifically identified interest has occupied such a place of honor in our Nation's traditions so as to be considered fundamental. *Id.* In the instant case, the asserted parental liberty interest is an absolute right to preclude a child from having visitation with persons other than another parent, regardless of the circumstances. Although the traditions of this country reflect deference to certain aspects of parental liberty, amici respectfully submit that they do not embrace the all-encompassing autonomy sought in this case.

In addition, caution is appropriate in extending the scope of rights recognized to be fundamental.

> "'[W]e ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' *Collins*, 503 U.S., at 125, 112 S. Ct., at 1068. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena

> of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' *ibid*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, *Moore*, 431 U.S., at 502, 97 S. Ct., at 1937 (plurality opinion)." *Glucksberg*, 521 U.S. at 720.

Caution seems particularly appropriate in the instant case, as Washington's statutes implicate the liberty interests of minor children, as well as parties petitioning for visitation. The Court has recognized that freedom of association extends to "choices to enter into and maintain certain intimate human relationships", as an element of personal liberty. *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984). The First Amendment protects relationships, including but not limited to family relationships, that involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life". *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (quoting *Roberts*, 468 U.S. at 619-20). Washington's statutes account for and strike a reasonable balance with respect to these associational interests.

The challenged statutes authorize visitation only on a showing by the petitioning party that visitation is in the best interests of the child. It is difficult to imagine that this standard will be met absent a personal and beneficial relationship between the petitioning party and the child. Indeed, the present version of Wash. Rev. Code 26.09.240 provides that a petition for visitation "shall be dismissed unless the petitioner or intervenor can demonstrate by clear and convincing evidence that a significant relationship exists with the child with whom visitation is sought". Wash. Rev. Code 26.09.240(3) (1996 Wash. Laws ch. 177, § 1).

Finally, where important liberty interests of children are implicated by state regulation, the Court has found constitutional value in a check on parental decision-making by a neutral third party. In *Parham v. J.R.*, 442 U.S. 584 (1979), this Court considered whether a Georgia statute that authorized parents and guardians to voluntarily commit their children to state mental hospitals satisfied procedural due process. In part because the commitment process required independent review by qualified medical personnel of the parental request for commitment, the Court concluded that the statute provided necessary procedural protections. In *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976), the Court held that the state may not give to parents an absolute veto over the decision of a pregnant minor to terminate her pregnancy. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 440 (1983), the Court concluded that "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests". Washington's visitation statutes provide for a similarly appropriate neutral decision-maker to address competing constitutional interests.

In summary, the claim for parental autonomy asserted in this case does not rise to the level of a fundamental right. A parent has no fundamental right to preclude a child from having contact with other persons, regardless of the circumstances and where such contact would be in the best interests of the child.

3. Washington's Visitation Statutes Do Not Substantially Burden Parental Rights. The Statutes Rationally Advance The State's Important Interest In The Welfare Of Children And Should Stand

Even if one were to assume that the claimed parental interest in this case is fundamental, not every state regulation implicating a fundamental liberty interest must satisfy exacting scrutiny. That certain human activities have been deemed

fundamental rights does not mean that every state regulation touching on or implicating such rights is permissible only if it advances a compelling state interest through means that are narrowly tailored to effecting that interest.

> "By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

To the same effect is *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), which upheld a statute allotting food stamps based on a statutory definition of "household". The definition treated parents, children, and siblings who lived together as a household, regardless of whether they purchased food or prepared meals together, but treated other individuals living together as a household only if they did so. Treatment as a household decreased food stamps available to parents, children, and siblings who lived together. In sustaining the statute, the Court held that the statutory classification did not "directly and substantially" interfere with family living arrangements and thereby burden a "fundamental right". *Lyng*, 477 U.S. at 638.

This approach also is apparent in *Bates v. City of Little Rock*, 361 U.S. 516 (1960). In *Bates*, an ordinance implicated a fundamental right – freedom of association. It required disclosure of membership lists of certain nonprofit corporations, including the NAACP. In discussing the appropriate analysis of the issue, the Court explained that "[w]here there is a *significant encroachment* upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates*, 361 U.S. at 524 (emphasis added). The Court's use of this analytical

framework also is discussed in depth in *City of Akron*, 462 U.S. at 462-64 (1983) (O'Connor, J., dissenting).

Washington's third-party visitation statutes do not substantially burden parental rights. Washington's visitation statutes do not diminish, let alone terminate, the legal relationship between a parent and child, as was the case in *Stanley* and *Santosky*. Nor do Washington's statutes interfere with legal custody of the child. Washington's statutes do not preclude a child's parents from controlling the child's religious upbringing or education, as was the case in *Pierce* and *Yoder*. They do not interfere with other essential aspects of the parent-child relationship. In short, under Washington's statutes, the parent-child relationship and the nuclear family remain intact, and legal custody remains with the parent.

In essence, Washington's statutes merely provide a mechanism by which a person, other than a natural parent or legal custodian of a child, may seek to protect the well-being of a child by proving to a neutral tribunal that his or her relationship with a child is significant enough that some level of contact with the child would be in the child's best interests. The child's parents are full participants in this inquiry. The child's parents have every right and opportunity to express their concerns and objections with respect to requested visitation. Parental rights and interests are important considerations not only in determining whether visitation is in the best interests of the child, but also in determining the form that any visitation should take, and restrictions that should attend it. Only if the petitioning party can demonstrate that contact is in the best interests of the child – in light of all of the relevant circumstances, including the rights and interests of the child's parents – is contact authorized. In these respects, the statutes are well designed to advance the very interests the law traditionally presumes a parent will advance – i.e., the best interests of the child. *Parham*, 442 U.S. at 604. And they do so in a way that respects parental interests.

Each of these factors supports the conclusion that Washington's visitation statutes do not significantly interfere with or impose an undue burden on parental rights. The statutes require consideration and balancing of the legitimate interests of all concerned parties. They leave the parent-child relationship and the nuclear family intact. And they leave legal custody and its attendant rights and obligations with the child's parents or legal custodians.

The majority below premised its decision on the view that Washington's visitation statutes are tantamount to asserting that "the state may break up families and redistribute its infant population to provide each child with the 'best family'". Pet. Writ Cert. at 21a. Without question, matters touching on family relations often evoke strong emotions. But the majority's characterization is untenable in light of the terms and limited reach of the statutes at issue.

So too is the majority's cramped view of the legitimate parens patriae and police power interests of the state. As the majority below views it, the state has no role to play in advancing the welfare of children, unless the child's parents agree with the state's actions or the state's actions are necessary to prevent serious harm to the child. Pet. Writ Cert. at 15a-16a. As is discussed above, the majority's conclusion elevates parental autonomy to a near absolute level, unwarranted by constitutional principles. In doing so, it unduly circumscribes the state's legitimate interests in the welfare of children and the public welfare.

> "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection." *Prince*, 321 U.S. at 168.

See also Kovacs v. Cooper, 336 U.S. 77 (1949) (recognizing that the police power of a state reaches beyond health, morals and safety and within constitutional limitations, comprehends

the duty protect the well-being and tranquility of the community).

Washington's statutes rationally advance the welfare of children. They reflect a legislative determination that a child's welfare is served by providing a child access to persons beyond the child's nuclear family who have manifested significant concern for the child and an important bond with the child. That "individuals draw much of their emotional enrichment from close ties with others", hardly can be doubted. *Roberts*, 468 U.S. at 619. Even in the best of situations, parents are not and need not be the only source of close human ties and emotional support for their children. In less ideal situations, parents may be ill-equipped to provide such support. If the state may not make available to third parties a process to protect the welfare of children, that contemplates full participation by parents and consideration of parental interests, and that authorizes the minimal intrusion of visitation only when it is demonstrated that visitation is in the best interests of the child, then the state's duty and authority to advance the welfare of children has little meaning. Amici respectfully submit that the United States Constitution does not compel this result and does not require the state to forgo its legitimate interests in the well-being of children under the circumstances contemplated by Washington's statutes.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of the Visitation of NATALIE ANNE TROXEL and ISABELLE ROSE TROXEL, Minors,

JENIFER and GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE COALITION FOR THE RESTORATION OF PARENTAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

At present, in all 50 states, parents may be subjected to an intolerable intrusion upon a painful and personal decision. The state may, upon the petition of a grandparent[2], force a parent to relinquish temporary custody of his child, despite the parent's decision that contact or extensive contact with that grandparent is bad for the child. This amicus represents the interests of such parents and their families.

The Coalition for the Restoration of Parental Rights includes members from many states. They are parents, other family members, and friends of families affected by court-imposed grandparent visitation. The parents have been forced to air the most personal details of their family histories, in the attempt to defend their decisions to limit a grandparent's access to their children. Often those attempts have been futile, and the parents have been forced to accede to visitation they deem dangerous to their children's physical or emotional well-being. Always, the process has been expensive, invasive, exhausting, and highly stressful for children and parents alike. For many parents, the lawsuit was one more blow following the pain and disruptions of a spouse's death or a divorce.

These parents have seen their own assessments of their children's needs devalued; their own detailed knowledge of their families' history ignored in favor of what little a judge could learn in a hearing or two. Those more learned in the law realize that the state has infringed their fundamental rights. Others simply know that something has gone badly wrong.

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[1] The parties have consented in writing to the filing of this amicus brief.
[2] A few states, including Washington, allow other nonparents to file visitation petitions as well. The arguments in this brief apply with equal or greater force to such petitions.

SUMMARY OF ARGUMENT

Parents have a fundamental right to rear their children, and to make the necessary decisions involved in that most noble and most difficult task. This Court has recognized, over many years and in many decisions, that our Constitution as well as our traditions protect this right. Parents' rights to raise their children include, of necessity, the right to decide what caretakers to trust, what associations to encourage, what role models to endorse. All these decisions are inevitably involved in the decision whether and when to expose children to those outside the immediate family.

This fundamental right does not vanish when parents divorce, nor when one parent dies. This Court has recognized that parental rights do not depend on marital status. The legal tradition allowing parents to exclude grandparents arose at a time when divorce was not uncommon, and a parent's death more common than it is today.

Those who support court-imposed visitation usually claim that the infringement is minimal. On the contrary, the impact of the litigation on family privacy, the invasion of the family home, the coerced removal of the child from the parent's custody for days or weeks at a time and on repeated occasions, is a greater infringement than impacts deemed excessive in the seminal family rights cases.

In contrast to parents, grandparents have no traditional or common-law right to visit with children where the parents object. There is no basis for finding such a right to be among the substantive protections of the Fourteenth Amendment.

Absent a showing of harm, the state has no legitimate, let alone compelling, interest in overriding a parent's decision on who shall associate with or care for his child. Parents are presumed to act in the best interests of their children. They have the natural desire and the intimate knowledge necessary to perform that task. Courts cannot possibly match the depth of a parent's knowledge of the child's history and needs. Moreover, professional research does not indicate that relationships between grandparents and grandchildren typically have any lasting beneficial impact on the children. Whatever benefits may accrue in happier circumstances are unlikely to result when visitation is imposed over parental objection. There is thus no substantial state interest in disrupting families and overruling parental decisions in order to promote grandparent/grandchild relationships.

In fact, there is near universal consensus, even among those who support grandparent visitation statutes, that the litigation they foster is detrimental to the children involved. The proceedings subject the child to trauma comparable to divorce proceedings. The children's sense of stability is undermined by the challenge to parental authority. The invasive and adversarial nature of the proceedings exacerbates whatever difficulties gave rise to the dispute. The damage is even worse where the child's world has already been shaken by divorce or the death of a parent. If the goal is to strengthen familial bonds, such counterproductive means cannot be deemed even rationally related to that goal, let alone necessary and narrowly tailored.

Judges are not equipped to make the decisions being thus usurped. With little guidance, little information, and little time, judges are apt to award or deny visitation based on their personal views or unproved assumptions. It is hardly surprising that patterns of gender discrimination and racial discrimination have emerged in the application of grandparent visitation statutes.

ARGUMENT

I. CUSTODIAL PARENTS, WHETHER MARRIED OR SINGLE, HAVE A FUNDAMENTAL RIGHT TO AUTONOMY AND PRIVACY IN CHILD-REARING DECISIONS

A. Parental Child-Rearing is A Fundamental Constitutional Right and Includes the Right to Decide with Whom Child will Associate[3]

"One of the first rights to be recognized as fundamental was 'the liberty of parents and guardians to direct the upbringing ... of children under their control.'"[4] It has been reaffirmed throughout the ensuing decades, a constant rock amidst the ebb and flow of constitutional jurisprudence.[5]

A parent cannot direct the rearing of his or her children without the authority to screen the child's relationships with others. This authority constitutes "an inseparable and inalienable ingredient of the parent's right to custody and control of a minor child." *Davis v. Davis*, 91 S.E.2d 487, 490 (Ga. 1956).[6]

Furthermore, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children." *Pierce v. Society of Sisters*, *supra*, 268 U.S. at 535. For the state to insist upon grandparent visitation over parental objection, based on a presumption that families who welcome grandparents will be happier families, "amounts to the imposition of a state sanctioned ideal."[7]

B. Intact Marriage is Not a Prerequisite of Parental Rights

A parent who loses his or her partner through death or divorce does not become less of a parent. The parent's responsibility does not diminish; the rights which accompany that responsibility remain as well. Yet a single parent's task is more difficult, the family more vulnerable to stress and disruption. Governmental actions which infringe parental

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[3] While this Court's case law has located fundamental rights as against the states in the Fourteenth Amendment's due process clause, the following arguments could also be made under that amendment's "privileges and immunities" clause. *See* John Hart Ely, *Democracy and Distrust* (1980), at 22-30; Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 52-54 (1991).

[4] Michael J. Minerva, Jr., *Grandparent Visitation: The Parental Privacy Right to Raise their "Bundle of Joy,"* 18 Fla. St. U. L. Rev. 533, 541 (1991), quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

[5] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Griswold v. Connecticut*, 381 U.S. 479, 495-497 (Goldberg, J., concurring) (1965); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-620 (1984); *id.* at 631 (O'Connor, J., concurring); *Bowers v. Hardwick*, 478 U.S. 186, 190-192 (1986); *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990).

[6] As noted *infra*, the common law recognizes a parent's right to decide with whom the child will associate, and would not order grandparent visitation over parental objection absent exceptional circumstances. The fact that grandparent visitation statutes are currently ubiquitous in this country does not mean that our national values and traditions embrace such statutes. These statutes do not reflect legislative recognition of a change in societal mores; rather, they are the result of intense political activity by an increasingly powerful senior citizen's lobby. Andre P. Derdeyn, M.D., *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?*, 55(2) Amer. J. Orthopsychiatry 277, 282 (1985); Judith L. Shandling, Note, *The Constitutional Restraints on Grandparents' Visitation Statutes*, 86 Colum. L. Rev. 118, 121 (1986); Ross A. Thompson et al., *Grandparents' Visitation Rights: Legalizing the Ties that Bind*, Am. Psychologist 1217, 1218 (Sept. 1989).

[7] Joan Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49(1) Okla. L. Rev. 29, 33 (1996).

rights are even more devastating to a family where one parent bears his or her responsibility unshared.

In this Court's protection of fundamental family rights, "[t]he legal status of families has never been regarded as controlling." *Smith, et al. v. Organization of Foster Families*, 431 U.S. 816, 845, n. 53 (1977) [hereinafter *OFFER*]. The Constitution protects "the interest of *a* parent in the companionship, care, custody, and management of *his or her* children." *Stanley v. Illinois*, *supra*, 405 U.S at 651 (emphasis added). "The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children." *Michael H. v. Gerald D.*, 491 U.S. 110, 123, n. 3 (1989).[8] By the same token, parents who have undergone divorce or the bereavement of their spouse's death retain their fundamental rights to raise their children without state veto of their decisions.

Divorce has always been part of the American family landscape. Before the American Revolution, all the colonies allowed either divorce or partial divorce (separation).[9] After the revolution, almost all the states relaxed their divorce

[8] Unwed fathers share in this protection, so long as they have accepted and borne the responsibilities of fatherhood. *Stanley v. Illinois*, *supra*; *see also Caban v. Mohammed*, 441 U.S. 380, 393 (1979). This Court's decision in *Quilloin v. Walcott*, 434 U.S. 246, 255-256 (1978), turned on the fact that the biological father had never had, or even sought, custody of the child, and had never filled the parental role. The plurality opinion in *Michael H.*, *supra*, turned on the father's very limited contact with the child and, even more, on the fact that the father was an adulterous intruder on an otherwise ongoing family relationship. Indeed, *Michael H.* emphasizes that the existing family's integrity and privacy would be improperly invaded by any state procedure that recognized the petitioner's claim. 491 U.S. at 124, 130-131.

[9] P. L. Griswold, *Adultery and Divorce in Victorian America, 1800-1900* 3, Institute For Legal Studies (1986).

laws, and divorce could be based on less serious allegations.[10] The divorce rate rose dramatically in the late nineteenth and early twentieth centuries.[11] Moreover, while divorce is even more commonplace now than in earlier decades, the death of a parent was undoubtedly more common in years past. Indeed, *Succession of Reiss*[12], the seminal case concerning grandparent visitation, involved a widowed father. Both the common-law and the constitutional precedent establishing a parent's fundamental autonomy rights developed against this backdrop. There is therefore no basis for the argument that a parent's death or divorce vitiates these rights.[13]

II. GRANDPARENT VISITATION STATUTES ARE UNCONSTITUTIONAL INFRINGEMENT ON PARENTAL AUTONOMY AND FAMILY PRIVACY RIGHTS

A. State Interference with Parental Decision-Making Is Subject to Intensified Scrutiny and Must be Presumed Unconstitutional

Government intrusions on fundamental rights, including the right of family privacy, are subject to strict scrutiny.[14] A statute impinging upon a fundamental right is

[10] *Id.* at p. 5; Nelson Blake, *The Road to Reno: A History of Divorce in the United States* 49 (1977 ed.).

[11] P. L. Griswold, *supra*, at p. 2; Blake, *supra*, at p. 150.

[12] 15 So. 151 (La. 1894). *See also, e.g.*, *Noll v. Noll*, 98 N.Y.S.2d 938 (App.Div. 1950).

[13] Many proponents of grandparent visitation statutes point out the fallacies in any attempt to distinguish families according to the parents' marital status. *See, e.g.*, Sarah Norton Harpring, Comment, *Grandparent Visitation: Is the Door Closing?*, 62 U. Cinn. L. Rev. 1659, 1691 (1994); *Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 322 (Fam. Ct. 1984).

[14] *Griswold v. Connecticut*, *supra*, 381 U.S. at 497 (Goldberg, J., concurring); *see also Bowers v. Hardwick*, *supra*, 478 U.S. 186 at 191 (privacy rights "to a great extent are immune from federal or state

presumed to be unconstitutional. *Harris v. McRae*, 448 U.S. 297, 312 (1980).[15] To overcome that presumption, the state must prove that it has a compelling state interest in its infringement of the protected right.[16] It must then prove not only that the challenged infringement is an effective means of serving that interest, but that no less restrictive means is available.[17]

This Court has not replaced the strict scrutiny afforded fundamental parental rights with the "undue burden" standard. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), emphasized that abortion was a unique case. Even in that admittedly unique context, a majority of the Justices opposed the *Casey* plurality's use of the "undue burden" standard, to the extent it fell below the level of strict scrutiny. Even if the "undue burden" standard applied, however, the judicial overthrow of the parent's decision to exclude a grandparent constitutes a severe and undue burden on the parental right to direct the child's upbringing and decide with whom the child shall associate.

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regulation or proscription"). *Meyer* and *Pierce*, the earliest cases establishing parental autonomy as a fundamental right, predated the establishment of varying layers of scrutiny in substantive due process cases. The standard of review they employed was effectively similar to the modern strict scrutiny standard.

[15] *See also* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 Loy. L.A. L. Rev. 449, 453-455 (1988).

[16] *Regents v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall and Blackmun, JJ.); *San Antonio v. Rodriguez*, 411 U.S. 1, 16-17, 34, n. 33 (1973); *Carey v. Population Services*, *supra*, 431 U.S. at 686, 693, n. 15.

[17] *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Bakke*, *supra*, 438 U.S. at 357; *Dunn v. Blumstein*, 405 U.S. 330, 343, 353 (1972); *see Bowers v. Hardwick*, *supra*, 478 U.S. at 189; *Griswold v. Connecticut*, *supra*, 381 U.S. at 497 (J. Goldberg, concurring); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

B. Visitation Statutes' Significant Encroachment on Parental Rights is Greater than Infringements Disallowed in Previous Parental Rights Decisions of This Court

Proponents of court-imposed visitation typically describe it as, at most, a "minimal" infringement of the parent's custody and child-rearing rights.[18] This characterization utterly ignores the nature of the invasion and the factual context almost inevitably surrounding it.

Even if "grandparent visitation" meant only that the parent must allow the grandparent into the family home to see the grandchild, it would be a significant invasion of family privacy and a substantial infringement on parental child-rearing authority.[19] In most cases, parents welcome grandparents into the home, and rejoice to see the grandparents enjoy the grandchildren's company. Any departure from this attitude is likely to be the result of profoundly disturbing experiences. It is not a decision likely to be lightly made. For the state to overrule parental decisions this weighty and this painful cannot reasonably be characterized as a minimal infringement of the right to shape the children's environment. For the state to force open the doors of the family home, ushering in an outsider the parent no longer trusts, is no small intrusion.

However, visitation orders are rarely, if ever, this limited in nature. "Visitation" typically means that the child must be sent to the grandparent's home for a weekend, or a

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[18] Dicta in *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), indicates that a state may impose reasonable regulations on exercise of a fundamental right -- so long as those regulations "do not significantly interfere with [the] *decisions*" underlying the exercise of the right. (Emphasis added.) State-imposed grandparent visitation strikes directly at the heart of the parent's decision on who shall guide and supervise his child.

[19] *See Brooks v. Parkerson*, 454 S.E.2d 769, 773, fn. 6 (Ga. 1995).

week, or even many weeks, and not just once but repeatedly. Such visitation is in essence a temporary form of custody, displacing for a time the custody of the parents.[20] The parent, let his fitness be unquestioned, is forced under threat of fine or imprisonment to send his child outside his protection and supervision. He can only hope that the parent's moral and disciplinary guidelines will be followed, his safety rules observed -- despite the likelihood that the grandparents' refusal to honor such parental decisions gave rise to their initial exclusion. The child may be unwilling or even afraid to go; the parent is forced to reject his child's heartfelt, and possibly reasonable, desires. The parent cannot exercise his parental function; the parent-child relationship is invaded and disrupted.

Finally, there is the nature of the litigation involved. As discussed further *infra* at D.3., the trial court is free to -- even obligated to -- dig deep into the confidential details of family history and family functioning, in the attempt to pin down the elusive "best interests of the child." Family privacy is sacrificed to the judge's mandate.[21]

The government intrusions overturned in *Meyer* and *Pierce* pale in comparison. *Meyer* found too great an infringement in the state's ban on certain foreign language lessons during school hours. That statute, "[u]nlike grandparent visitation, . . . would not separate parents and children who would otherwise be together. Furthermore, its ban could be completely circumvented by providing language

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[20] Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 Am. U. L. Rev. 563, 573, n. 59 (1994); *see, e.g., Jackson v. Fitzgerald*, 185 A.2d 724, 726 (Col.App. 1962).

[21] *See Succession of Reiss*, *supra*, 15 So. at 152.

instruction at other times."[22] Similarly, *Pierce* forbade a state to require that a parent send his child to a public school, rather than a private school. Even though any omissions from the public school's curriculum could be ameliorated by home instruction, the parent had the right to choose the child's school environment. Where the state coerces the parent into giving a grandparent temporary custody, the divergence between the parent-approved environment and the state-imposed alternative may be as great or greater -- and the child will not be coming home after school.

C. Grandparents Have No Traditional or Constitutional Right to Visitation

1. The Common Law Acknowledged Parent's Rights and Would Not Compel Grandparent Visitation Over Parental Objection

There is overwhelming consensus that grandparents have no common law right to see their grandchildren when the parents object.[23] Courts repeatedly cited a number of reasons against overriding the parent's decision to exclude grandparents from the home. They recognized that parental autonomy was a fundamental value, not to be infringed by the courts. Granting grandparents an independent right of visitation would, they feared, undermine parental authority. Further, it would cause intergenerational conflict harmful to

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[22] Bohl, *The "Unprecedented Intrusion," supra*, at 64-65, n. 280.

[23] *See, e.g.*, Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 Colum. J. L. & Soc. Probs. 319, 326 (1994); Edward M. Burns, *Grandparent Visitation Rights: Is it Time for the Pendulum to Fall?*, 25(1) Fam. L. Q. 59, 61 (1991); Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 Conn. L. Rev. 1315, 1331 (1994); Derdeyn, *supra*, at 277; Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. Va. L. Rev. 295, 303, 310 (1985); Jackson, *supra*, at 573-574; Shandling, *supra*, at 118.

the child. Finally, the courts realized that the coercive measures under their command would not be an effective means of restoring harmonious relations between parents and grandparents.[24]

Courts would override the parent's decision only in exceptional cases. "[T]hose special circumstances uniformly included an established, close, and meaningful relationship between the grandparent and the grandchild."[25] Then some additional factor was necessary, such as a years-long custodial relationship, the provision in a father's will when the father died in battle, parental unfitness, or a father's inability to exercise his own visitation rights.[26] As noted above[27] at I.B., the death of a parent, or the parents' divorce, was not in itself sufficient basis for this exceptional treatment.

2. <u>There is No Basis in Constitutional Law for a Grandparent's "Right" to Visitation</u>

Given the great importance of tradition in establishing fundamental privacy rights not explicit in Constitutional text,[28] the common-law tradition described above precludes the existence of any substantive due process right of grandparents to visit their grandchildren where the parents object.[29]

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[24] Jackson, *supra*, at 573-74; Bostock, *supra*, at 326.
[25] Burns, *supra*, at 62.
[26] Bohl, *The "Unprecedented Intrusion," supra*, at 30-31, n. 9; Burns, *supra*, at 62; Bostock, *supra*, at 327.
[27] See I.B. of this brief, *supra* pp. 6-7.
[28] *Michael H., supra*, 491 U.S. at 122-123; *Bowers v. Hardwick, supra*, 478 U.S. at 192; *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.).
[29] Jackson, *supra*, at 574-575 (1994); Minerva, *supra*, at 556.

A parent's fundamental liberty interest in his or her child's companionship derives in large part from the responsibilities the parent has assumed.[30] Grandparents have even less legal responsibility for their grandchildren than unwed fathers for their children, as grandparents generally have no duty to help support their grandchildren financially.

Proponents of visitation statutes frequently claim support from *Moore v. City of East Cleveland, supra*, 431 U.S. 494. There is no legal or logical justification for jumping from the liberty found in *Moore* to the state coercion at issue here. In *Moore*, a father and son chose to live with the paternal grandmother, and the father of another grandson consented to his son's joining the household after the mother's death. 431 U.S. at 496-497 incl. n. 4. A small group of blood relations freely chose to live together, with the consent of all living parents of the children. This choice did not challenge or infringe upon any other family rights. *Moore* focused exclusively on the rights inherent in a group of relations sharing a single household. It defended that household against the intrusion of state or local lawmakers. In no way did it authorize a nonresident relative's intrusion into the household. *Moore* shows us how the Constitution protects even a relatively unconventional family household from outside interference. A fortiori, parents living with their children have the right to such protection.

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[30] *Lehr v. Robertson*, 463 U.S. 248, 259-260 (1983), emphasized "[t]he clear distinction between a mere biological relationship" -- such as grandparent status -- "and an actual relationship of parental responsibility." *Quilloin v. Walcott, supra*, 434 U.S. at 256, similarly relied upon the fact that the unwed father "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. . . . Even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage."

D. The States Have No Compelling, Substantial, or Legitimate Interest in Ordering Grandparent Visitation Over a Fit Custodial Parent's Objections

This Court has recognized that the state has no legitimate interest in directing how members of a family shall communicate or commune.[31] As stated above, the amicus believes this Court's precedents require strict scrutiny of grandparent visitation laws, so that the state must show a compelling interest that can be served no other way. However, whether the standard be strict scrutiny or some intermediate scrutiny, or even true rationality, grandparent visitation statutes fail the test.

1. Parents are Presumed to Act in Child's Best Interests, and Courts are Not Equipped to Supplant Them In That Role

In *Parham, et al. v. J.R., et al.*, 442 U.S. 584, 602-603 (1979), this Court summarized in the clearest terms the bedrock legal principle that parents are presumed to act in their children's best interests.

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . . That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. . . . The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

[31] *See Hodgson v. Minnesota, supra*, 497 U.S. at 452.

Similarly, in *Hodgson v. Minnesota, supra*, 497 U.S. at 450, this Court noted that "the State has no legitimate interest in questioning one parent's judgment . . . or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child."[32]

It takes only a little thought to see that it must be so. How many decisions must a parent make every day, every week, every year, in raising a child? Who can count how many of those decisions will change a child's life for good or ill, and to how great an extent? Every parent knows how terrifying, yet how ever-present and inescapable, is the responsibility to make decision after decision for the child's welfare. If state governments are to begin second-guessing these decisions, where shall they begin? and where will it end?[33]

[32] *Hodgson* reaffirmed "the parental right ... to assess independently, for their minor child, what will serve that child's best interest." *Id.* at 453. *See also OFFER, supra*, 431 U.S. at 841, n. 44, noting that child's interests are usually represented in litigation by parents or guardians; *Santosky v Kramer, supra*, 455 U.S. at 760: ". . . the State cannot presume that a child and his parents are adversaries."

[33] *See Noll v. Noll, supra*, 98 N.Y.S.2d at 940, warning of the difficulties should judges "tell parents how to bring up their children." It should be noted that *Noll* involved a single parent (widow). Almost one-third of all families do not fit the "two married parents with their biological children" mold. Theresa H. Sykora, *Grandparent Visitation Statutes: Are the Best Interests of the Grandparent Being Met Before Those of the Child?*, 30(3) Fam. L. Q. 753, 754 (1996). If only families where two married parents live with their natural children are to retain their fundamental constitutional protection, the states will be busy indeed, superintending the conduct and reviewing the decisions of all those "second class" parents who bear their responsibilities without a spouse present.

[L]aw does not have the capacity to supervise the delicately complex interpersonal bonds between parent and child. As *parens patriae* the state is too crude an instrument to become an adequate substitute for parents. The legal system has neither the resources nor the sensitivity to respond to a growing child's ever-changing needs and demands. It does not have the capacity to deal on an individual basis with the consequences of its decisions or to act with the deliberate speed required by a child's sense of time and essential to its well being. Even if the law were not so incapacitated, there is no basis for assuming that the judgments of its decisionmakers about a particular child's needs would be any better than (or indeed as good as) the judgment of his parents. Only magical thinking will permit the denial of these self-evident, but often ignored, truths about the limits of law.[34]

A parent's decision to cut off or reduce contact with a grandparent is the last act in a years-long drama. "[A] single court hearing is generally insufficient to resolve the background issues that have taken years to develop."[35] In *Parham*'s words, "neither state officials nor federal courts are equipped to review such parental decisions." 442 U.S. at 604.

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[34] Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L. J. 645, 650 (1977).
[35] Harpring, *supra*, at 1678.

2. Parens Patriae Power Does Not Justify Infringement of Parental Rights Absent Showing of Harm or Unfitness

The state may step in to protect children from abuse, neglect, a parent's refusal to supply essential medical treatment, and other such direct threats to the child's welfare.[36] However, the state's parens patriae powers[37] do not "trump" constitutional protections of fundamental liberties. The terms "welfare" and "best interests" are not synonymous: before the state may intervene, there must be a threat of harm to the former, rather than merely an opportunity to contribute to the latter.[38]

"To protect parental autonomy, the Supreme Court has developed a threshold test for the imposition of the state's *parens patriae* interests [citing, inter alia, *Meyer*, *Pierce*, and *Stanley*]. Generally, the state cannot interfere with the parents' right to raise a child in a particular manner unless the parents' practice endangers the child."[39] Where a parent has not been found unfit, the state "cannot presume that the parent and child are adversaries," or that their interests diverge. *Santosky*, *supra*, 455 U.S. at 760, 767, n. 17. "The

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[36] *Prince v. Massachusetts*, 321 U.S. 158 (1944) ; *Jehovah's Witness v. King County Hosp.*, 278 F.Supp. 488, 504-506 (W.D. Wash. 1967), *aff'd* 390 U.S. 598 (1968). *See* Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. Fam. L. 393, 426 (1985-86): "Absent extraordinary circumstances which seriously affect the welfare of the child, the state has no basis for displacing or intruding on parental control."
[37] This Court has described the meaning of the phrase "parens patriae" as "murky." *In re Gault*, 387 U.S. 1, 16 (1967).
[38] *See, e.g., Brooks v. Parkerson*, *supra*, 454 S.E.2d at 772-773, incl. n. 5; *Williams v. Williams*, 501 S.E.2d 417, 423-424 (Va. 1988) (Kinser, J., concurring in part and dissenting in part); *Noll v. Noll*, *supra*, 98 N.Y.S.2d. at 940-941; *see also In re Marriage of Matzen*, 600 So.2d 487, 489-490 (Fla.App. 1992).
[39] Jackson, *supra*, at 571.

'best interests of the child' test is triggered after the finding of the failure of the parent-child relationship."[40] Thus, absent either the continuing danger posed by an unfit parent, or some extraordinary danger arising from the practices of otherwise fit parents (*e.g.*, refusal to allow vital medical treatment), the state's parens patriae role does not override parental control.

The main factor in determining how often children see their grandparents is not the status of the parent's marriage, or even the parent's attitude, but geographical distance.[41] May the states, under the rubric of parens patriae, decree that parents must reside within a fixed distance from grandparents? More generally, if the state may override parental decisions at will in pursuit of a child's "best interests," without showing the parents unfit or the child endangered, then the state may invade family privacy to direct the child's life in innumerable ways. "It behooves one to wonder as to what other arenas the legislature will deem parents unworthy to evaluate the best interest of their children."[42] What other "benefits" will the state step in to ensure? and at whose behest? State law could mandate prescribed diets and exercise regimes for children, from which parents departed at their peril. Legislators who cherished memory of their time in Boy Scouts could require all parents to send their children to Scout camp for two weeks every summer. Since wealth buys many advantages, children could be reassigned to wealthier families.[43] If the states,

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[40] Bean, *supra*, at 426.

[41] Andrew J. Cherlin & Frank F. Furstenberg, Jr., *The New American Grandparent: A Place in the Family, A Place Apart* 108, 117, 191 (1986).

[42] Moore, Student Article, *King v. King: The Best Interest of the Child: A Judicial Determination for Grandparent Visitation*, 20 N. Ky. L. Rev. 815, 828 (1993).

[43] The last example may seem wildly unlikely, but this very practice was relatively common during the early nineteenth century, a time when the courts stretched the notion of parens patriae authority beyond all

rather than the parents, are the guardians of the best interests of children with fit parents, then "we have embarked upon a slow de[s]cent into judicial supervision of family life which has neither legal limits nor a logical end."[44]

3. Research Does Not Indicate Lasting Positive Impact from Interaction with Grandparents, Let Alone Harm from Lack of Interaction

State courts that have upheld grandparent visitation statutes typically presume that grandparents play a unique, important and beneficial role in the lives of their grandchildren. However, as noted in *Roberts v. Jaycees*, *supra*, 468 U.S. at 628, this Court has "repeatedly condemned legal decisionmaking that relies uncritically on such assumptions." In fact, "[t]here are few research findings to support the presumption in grandparent statutes that the grandparent relationship is uniquely significant to either grandchildren or grandparents."[45]

The landmark study of sociologists Cherlin & Furstenberg revealed that greater involvement by grandparents had no ascertainable positive effect on the

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historical limits. *See* Joan Bohl, *Hawk v. Hawk: An Important Step in the Reform of Grandparent Visitation Law*, 33 J. Fam. L. 55, 69 (1994-95). Broad readings of parens patriae were increasingly criticized, and were curtailed in this Court's decision in *In re Gault*, *supra*, 387 U.S. at 16, 18.

[44] Bohl, *The "Unprecedented Intrusion," supra*, at 80.

[45] Ingulli, *supra*, at 305; *see also* Czapanskiy, *supra*, at 1330; *Brooks v. Parkerson*, *supra*, 454 S.E.2d at 773. There is relatively little research on the actual impact of grandparents on grandchildren. Bostock, *supra*, at 362, 368; Vivian Wood and Joan F. Robertson, *The Significance of Grandparenthood, in Time, Roles, and Self in Old Age* 278, 288 (Jaber F. Gubrium ed., 1976); Furstenberg & Cherlin, *Divided Families: What Happens to Children When Parents Part* 94 (1991).

behavior of grandchildren.[46] This was true regardless of family circumstances, whether or not the nuclear family life had been disrupted by circumstance. Nor do grandchildren typically include grandparents when listing members of their family, or regard them as sources of guidance.[47] As for transmission of values, grandparents transmitted values to grandchildren primarily through their impact on the intermediate generation, the parents, rather than directly.[48] Few grandparents believe they should even attempt to transmit moral values to their grandchildren.[49]

Grandparents tend to overstate the significance of their grandparental role compared to the actual level of their involvement: "While grandparents verbally attribute a great deal of significance to the role in discussions and interviews, the behavior of most grandparents in the role is relatively limited."[50] Given that many courts emphasis the importance of grandparents in passing on family history and customs, it is noteworthy that fewer than half the grandparents in one study reported that they had told their grandchildren about family history and customs, or had taught them a special skill

[46] Cherlin & Furstenburg, *New American Grandparent, supra*, at 178, 181-183. In fact, grandchildren with more involved grandparents actually had more behavioral problems, though this may have been the reason for the greater involvement rather than a result of it. *Id.* at 181, 183. Other researchers have found similar results. Ingulli, *supra*, at 300.

[47] Cherlin & Furstenberg, *supra*, at 169, 182. Similarly, when respondents of various ages were asked to identify the sources of knowledge on how to get along in life, and to name those who help children grow into happy and competent adults, none of the respondents mentioned grandparents. College students appeared as likely to feel close to aunts, uncles and cousins as to grandparents. Wood & Robertson, *supra*, at 287.

[48] Cherlin & Furstenberg, *supra*, at 178.

[49] Colleen Leahy Johnson, Ph.D., *Active and Latent Functions of Grandparenting During the Divorce Process*, 28(2) Gerontologist 185, 189 (1988).

[50] Wood & Robertson, *supra*, at 301.

such as sewing, cooking, fishing, or a craft.[51] Most grandparents seek to satisfy their own and their grandchildren's need for fun and pleasure, rather than taking on any weightier role. They treat the relationship as a friendship with little emphasis on the generational difference.[52]

Even Kornhaber and Woodward[53], often cited by proponents of visitation statutes, state that "the overwhelming majority" of grandparents in their study "expect to receive more affection from the grandchildren than they themselves are willing to give."[54] While Kornhaber and Woodward dwell at length on the roles a grandparent can conceivably fill,[55] they acknowledge that few grandparents actually fill many of these roles.[56] Grandparents tend to be absorbed in their own lives and concerns, and their grandchildren perceive as much.[57] Kornhaber and Woodward also acknowledge that the distance between grandparents and grandchildren results primarily from the grandparents' own choices of lifestyle or role. "The overwhelming majority of

[51] Wood & Robertson, *supra*, at 301-302.

[52] Johnson, *supra*, at 187-189.

[53] Arthur Kornhaber, M.D. & Kenneth L. Woodward, *Grandparents/Grandchildren: The Vital Connection* (1985). These authors assert that those few children who do have close relationships with at least one grandparent are more emotionally secure and have less fear of old age. They also claim that the bond between grandparent and grandchild, at least at its inception, is second only to that between parent and child. However, their assertions are based on a study with "several methodological weaknesses," and other researchers have been unable to duplicate their findings. Ingulli, *supra*, nn. 28 and 29 and accompanying text.

[54] Kornhaber & Woodward, *supra*, at 29.

[55] *Id.* at 38, 167-179.

[56] *Id.* at 37-39, 64-65. "[M]ost grandparents, including some otherwise altruistic persons, accept and even prefer a less than intimate relationship with their grandchildren." *Id.* at 102.

[57] *Id.* at 41, 88, 98.

grandparents . . . elected not to become closely involved with their grandchildren."[58]

In fact, the most common way in which grandparents indirectly affect their grandchildren is through their relationships with their adult children, the child's parents.[59] When grandparents can and do haul their adult children into court to force grandparent visitation, this indirect effect on the grandchildren becomes a profoundly negative one.

a. Grandparents' Role is Not Necessarily a Positive One When Parents Divorce

Grandparents are most satisfied with their role when the lives of their children and grandchildren are relatively free from problems.[60] Faced with the divorce of the parents, most grandparents tend to withdraw, rather than stepping in with some unique form of assistance.[61] Where grandparents do assist their recently divorced adult children, the parents "all too frequently" report that the grandparents interfered too much with the parent's authority or intruded into the private affairs of parent and child.[62]

Certainly, some grandparents react to the parents' divorce in constructive ways. However, others see it as an opportunity to reassert control over their adult children's

[58] *Id.* at 88; *see also* at 78-79, 86, 98. Other research has indicated that grandparents are more concerned with their relationships with their peers than with their relationships with grandchildren. Ingulli, *supra*, at 301.
[59] Thompson et al., *supra*, at 1219.
[60] Johnson, *supra*, at 190.
[61] Kornhaber & Woodward, *supra*, at 40-41.
[62] Furstenberg & Cherlin, *Divided Families*, *supra*, at 55.

lives,[63] while yet others respond by "attacking their child's former spouse or even attacking their own child."[64]

4. Any Positive Roles Grandparent Might Normally Fulfill are Impossible when Visitation is Coerced

One commentator[65] lists the "important roles" that grandparents might[66] play in the life of a child (here renumbered for clarity):

(1) Grandparents can "maintain the identity of the family";

(2) Grandparents can mitigate disturbing events in the outside world;

(3) Grandparents can provide a stabilizing influence;

(4) Grandparents can be watchdogs for abuse or neglect;

(5) Grandparents can serve as mediators or arbitrators between the parents and the grandchildren;

(6) Grandparents can allow grandchildren to build connections with family history.

Where grandparent visitation is without the parent's consent, however, these roles are either impossible to fulfill, unlikely to succeed, or almost inevitably distorted. "Maintenance of family identity" will become a conflict between incompatible family identities. A grandparent not welcome in the

[63] *Id. See also* Shandling, *supra*, at 122, n. 19, making the same observation in a broader context.
[64] Derdeyn, *supra*, at 285. It is sometimes argued that divorcing parents will let their animosity toward their spouses color their feelings toward the spouse's parents. As Derdeyn suggests, this concern must go both ways. Parents of the noncustodial spouse may view the custodial spouse as the enemy, and be more likely both to precipitate conflict and to take that conflict to court.
[65] *Jackson*, *supra*, at 567, n. 20.
[66] As noted above, research has not supported the argument that grandparents typically serve these functions.

household will be introducing further "disturbing events," rather than mitigating the pain of existing disturbances. Obviously, a grandparent who is hauling the family into court will not be providing a "stabilizing influence." The aggravated distrust between grandparent and parent will greatly interfere with the grandparent's ability objectively to assess whether the grandchildren are abused or neglected; indeed, the grandparent will have a potent motive to exaggerate or imagine any facts that would transform the obstructing parent into the "bad guy." A grandparent who has forced his or her way into the family circle with the help of a judge is the last person who could serve as a mediator or arbitrator between parents and grandchildren. Finally, as with "family identity," any connections the grandparent could build with family history will be hindered by the grandchildren's conflict of loyalties, and by the bitterness of the parents whose authority has been overthrown.

> [A] range of factors influence the degree to which benefits [from ongoing relationships with grandparents] can be realized by children in both stressed and unstressed families. . . . Foremost . . . is the quality of the relationship that exists between grandparents and the child's own parents. If the relationship is harmonious and supportive, this opens avenues for direct and indirect benefits that grandparents can offer their grandchildren. If not, these potential benefits are likely to be much more limited (indeed, children may suffer from extended contact with grandparents if significant intergenerational conflict exists). Consequently, most of the obstacles that grandparents may encounter in their efforts to support their grandchildren cannot readily be resolved through litigation that makes the

child's parents and grandparents adversaries in a courtroom.[67]

D. Grandparent Visitation Statutes are Not a Necessary, Rational or Effective Means of Furthering Any Permissible State Interest

1. Both Litigation and Resulting Court Orders are Detrimental to Children

The common law is replete with warnings that using judicial process to coerce a family into accepting grandparent visitation is ill-advised. "[C]ourts were concerned that an intergenerational conflict would only hurt the development of the child involved."[68] The judge in the first reported United States grandparent visitation case cautioned that "the intervention of the tribunals would ... render the dissensions of the family more pronounced by delivering them to the public." *Succession of Reiss*, *supra*, 15 So. at 152; *see also Brooks v. Parkerson*, *supra*, 454 S.E.2d at 773.

Legal scholars, psychologists and sociologists have pointed out the many ways that grandparent visitation statutes harm the children they are purportedly designed to serve, and their families as well.[69] First, there is the harm done by the litigation itself. These are emotionally wrenching, heated, adversarial conflicts,[70] of an intensity and

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[67] Thompson et al., *supra*, at 1219.

[68] Jackson, *supra*, at 574; *see also* Thompson et al., *supra*, at 1217.

[69] These include commentators who believe that one or another kind of grandparent visitation statute is desirable and/or constitutional despite these damaging effects. *See, e.g.*, Shandling, *supra*, and Harpring, *supra*, as detailed *infra* at notes 71-73.

[70] *See Parham v. J.R. et al.*, *supra*, 442 U.S. at 610, on the inappropriate nature of "adversary contest[s]" that challenge "whether the parents' motivation is consistent with the child's best interests."

traumatic impact comparable to divorce proceedings.[71] The litigation strains the family's economic resources.[72] The intrusiveness of the proceedings and the challenge posed to the parent's authority causes the child extreme anxiety, confusion and dislocation.[73] The detailed and public airing of family secrets and disagreements, in a process whose adversarial nature magnifies every disagreement, leaves a residue of anger, humiliation and distrust which greatly reduces the chances of a peaceful reconciliation between parent and grandparent.[74] The grandparent's power to interfere in the parent's family tends to sabotage the natural process by which parents of adult children relinquish their parental status to the next generation.[75] Then, if the grandparent's petition is granted, the child is trapped for years in an "emotional minefield,"[76] the innocent victim of long-term loyalty conflicts.[77]

As the Florida Supreme Court suggested in finding Florida's grandparent visitation statute unconstitutional, even if such statutes served a compelling state interest, "alternatives such as providing mediation services, counseling, or other non-mandatory (and non-adversarial)

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[71] Introduction, Ellen C. Segal and Naomi Karp, *Grandparent Visitation Disputes: A Legal Resource Manual*, pg. 2 (1989); Derdeyn, *supra*, at 284, 286; Harpring, *supra*, at 1677; Sykora, *supra*, at 761; Jackson, *supra*, at 588, incl. n. 150.
[72] Bostock, *supra*, at 355.
[73] Minerva, *supra*, at 537; Shandling, *supra*, at 124; Harpring, *supra*, at 1677.
[74] Derdeyn, *supra*, at 286 ; Harpring, *supra*, at 1677. Petitioners acknowledge this reality in their Brief for Petitioners at p. 6, n. 10, stating that a "public airing" of the parties' disagreements as to why visitation ceased "could complicate relations between the individuals involved."
[75] Derdeyn, *supra*, at 284.
[76] Jackson, *supra*, at 580.
[77] Sykora, *supra*, at 761; Thompson et al., *supra*, at 1220.

services" would be more appropriate and narrowly tailored to serving that interest.[78]

2. Impact of Visitation Lawsuits and Orders is Even More Harmful Where Parents' Marriage is No Longer Intact

Divorce rocks a child's world. The death of a parent is even worse. When a child and his family are enduring these most traumatic of changes, can there be a worse time for events that frighten and anger both parent and child? that distract the parent from meeting the child's special needs? Grandparent visitation lawsuits make it even harder for the child to cope.[79] The litigation drains away financial resources already strained by widowhood or divorce.[80] The parents inevitably see the lawsuit as a further threat to the family's integrity; this increases the child's emotional turmoil, and undermines his sense of security and stability just when it needs reinforcement.[81] Thus, "[t]his legislation cannot rationally be considered to alleviate situations for children during difficult times."[82]

Nor can the trial court, be it never so wise, avoid this damage by the manner in which it considers the facts. The damage has been done before the trial court plays that role.

Finally, it must be remembered that children of divorced parents are likely to have one formal visitation

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[78] *Von Eiff v. Azicri*, 720 So.2d 510, 517, fn. 4 (1998).
[79] Thompson et al., *supra*, at 1220; Derdeyn, *supra*, at 285.
[80] Bostock, *supra*, at 356. Grandparents are often better positioned to bear the costs of litigation. Thompson et al., *supra*, at 1220; *see also* Minerva, *supra*, at 557. This may allow the grandparents to coerce the parents into an undesirable settlement to avoid ruinous litigation expenses. Thompson et al., *supra*, at 1220.
[81] Derdeyn, *supra*, at 285.
[82] *Id.*

schedule to cope with already. If a state enables grandparents to insist on visitation as well, the disruptions of the child's home life -- and the child's insecurity and disorientation -- will be multiplied. Divorced parents, especially if they have remarried, must perform a difficult juggling act, trying to accommodate the needs of their children and the desires of family members both old and new. The heavy-handed intrusion of the state is anything but helpful.

3. Application of Statutes is Inconsistent, Subjective, and Frequently Discriminatory

Grandparent visitation statutes typically offer judges little guidance beyond the phrase "best interests of the child."[83] Even the minority of statutes that include specific factors for the court to consider generally add a "catch-all" under which the court is to consider any other unenumerated factors which might somehow be relevant.[84] "Determining the best interests of the child in grandparent visitation cases is a difficult task and one that courts are ill-equipped to make."[85] As this Court noted in *In re Gault*, *supra*, 387 U.S. at 19, fn. 25: "The judge as amateur psychologist . . . is neither an attractive nor a convincing figure." Judges "may rely on subjective value judgments and their own intuitive assessments of family functioning: criteria that are applied parochially and unreliably and that may vary widely on a

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[83] Sykora, *supra*, at 761.

[84] *See, e.g.*, Nev. Rev. Stat. Ann. § 125C.050.3(j) (Michie Supp. 1999); N.J. Stat. Ann. § 9:2-7.1.b(8) (West Supp. 1999); N.M. Stat. Ann. § 40-9-2.G.(1) (Michie 1999); Vt. Stat. Ann. tit. 15, § 1013(b)(8) (1989); W. Va. Code Ann. tit. 14A, § 48-2B-5(b)(13) (Michie 1999); Wash. Rev. Code Ann. § 26.09.240(6)(h) (West 1997); cf. Ariz. Rev. Stat. Ann. § 25-409.C. (West Supp. 1999) ("all relevant factors, including [listed ones]").

[85] Bostock, *supra*, at 367.

case-by-case basis."[86] The fact that judges are likely to be grandparents or contemporaries of grandparents increases the likelihood of a bias in favor of grandparents' desires.

A judge attempting to apply the "best interest" standard must grasp at every factual detail he can uncover to resolve this dilemma. "Thus, apart from constitutional problems of using the best interest of the child standard without a prerequisite threshold showing of harm, the vagueness and subjectivity of such a standard lends itself to an invasion of family privacy which is abhorrent to our current society."[87]

Most disturbing of all, the application of grandparent visitation statutes tends to show racial and gender discrimination. Where the custodial parent is a mother, her objections to grandparent visitation are more likely to be discounted, and the court is more likely to ignore animosity between parent and grandparent. When custodial fathers object, courts are more likely to deny grandparent visitation.[88] African-American grandparents are more likely to have close relationships with their grandchildren, and to act as substitute parents for them. "Of all grandparents, then, they are the ones whose absence is most likely to hurt their

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[86] Thompson et al, *supra*, at 1220. As Justice Stevens noted in his concurring opinion in *Bellotti v. Baird*, 443 U.S. 622, 655-656 (1979) (*Bellotti II*):

> [T]he only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement ... -- particularly when contrary to [the party's] own informed and reasonable decision -- is fundamentally at odds with privacy interests underlying the constitutional protection afforded to [that] decision.

[87] Bean, *supra*, at 444.

[88] Czapanskiy, *supra*, at 1333-1334, 1343-46.

grandchildren. Nonetheless, they are among the least favored petitioning grandparents."[89]

Grandparent visitation statutes exacerbate family dissension, traumatize children, and tend to result in inconsistent and inequitable judgments. Even if the evidence supported a substantial or compelling state interest in "strengthening familial bonds," a means so counter-productive as this cannot be deemed rationally related to that goal, let alone "necessary" or "narrowly tailored" thereto.

CONCLUSION

For the reasons stated above, the amicus urges this Court to affirm the decision of the Washington Supreme Court, and in doing so to make clear that fit parents, whether married, single, divorced or widowed, retain their fundamental right to guide their children to adulthood.

Respectfully submitted,

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(22)

[89] *Id.* at 1341.

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In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL, *Petitioners,*

v.

TOMMIE GRANVILLE, *Respondent.*

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Does Washington's visitation statute, which permits the state to intrude into the private child-rearing decisions of fit parents who are raising children in an intact family, violate the Due Process Clause's guarantee of parental autonomy?

Assuming as Petitioners claim, that this case raises a facial challenge to Washington's visitation statute, should this Court employ the history and traditions analysis adopted in other substantive Due Process cases to determine the scope of parental rights?

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BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING RESPONDENT

INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is a nonprofit, public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the United States Supreme Court and lower federal courts, and Chief Counsel Jay Sekulow has presented oral argument before this Court in the following cases: *Schenck v. Pro-Choice Network of*

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* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the ACLJ discloses that no counsel for any party authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

Western New York, 519 U.S. 855 (1997); *Lamb's Chapel v. Center Moriches Union Free School Board,* 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993); *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 224 (1990); *United States v. Kokinda,* 497 U.S. 720 (1990); and *Board of Airport Commissioners v. Jews for Jesus,* 482 U.S. 569 (1987). Also, the ACLJ presently has pending before this Court two cases to be argued this term: *Hill v. Colorado,* No. 98-1856, and *Santa Fe Independent School District v. Doe*, No. 99-62

As an organization dedicated to protecting the family, the ACLJ is generally opposed to government intervention in the parent-child relationship absent a showing of parental unfitness. Petitioners have invited the Court to address the parameters of parental rights under the Due Process Clause of the Fourteenth Amendment, and any Court pronouncements on the scope of parental rights will have significant ramifications on the parent-child relationship. The ACLJ urges the Court to employ the history and traditions analysis appropriate in substantive due process cases under *Washington v. Glucksberg,* if the Court determines that this case requires it to clarify the scope of parental rights. In addition, the ACLJ argues that the lower court properly held that Washington Revised Code § 26.10.160, which grants the state expansive authority to intrude into the private child-rearing decisions of fit parents, violates the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

The ACLJ adopts the statement of the case set forth in Respondent's brief.

SUMMARY OF THE ARGUMENT

Parental rights have a pedigree unmatched in constitutional law. As one of the only pre-constitutional rights recognized by this Court under the Due Process Clause of the Fourteenth Amendment, parental rights have been deemed one of the most sacred liberties in our nation. When this Court first acknowledged parental rights in 1923, society and its traditions were relatively homogenous with respect to the proper means of creating and raising children. There was little if any need to define the scope of parental rights. Since *Meyer* and *Pierce*, society has changed dramatically, of course, and several cases have come before this Court raising issues concerning the scope of parental rights in circumstances as common now as they were uncommon at the time of *Meyer* and *Pierce*. *See, e.g., Michael H. v. Gerald D.,* 491 U.S. 110 (1991).

In this case, the Court has been invited to define the perimeters of parental rights in a manner which reflects the current condition of the family in America. If the Court accepts that invitation, the proper analytical framework for considering the scope of parental rights is the history and traditions analysis employed in this Court's substantive due process jurisprudence. Specifically, the contours of parental rights should be set by first describing the interest at stake with particularity, and then by examining the history and traditions giving rise to that interest. *See Washington v. Glucksberg,* 521 U.S. 702, 719 (1997). When carefully described in the light of history and tradition, parental rights are properly viewed as rights correlative of duties borne out of the reciprocal relationships in intact families. The right to raise one's children historically has been seen as the broader right to family integrity, because parental rights are relational rights originating in the family, not in the individual parent. This Court's cases consistently have extolled the family as the foundational unit of society and therefore the fountainhead of parental rights. *See, e.g., Michael H. v.*

Gerald D., 491 U.S. 110 (1991); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

When the scope of parental rights are correctly delineated in light of their historical backdrop, the unconstitutionality of Washington's visitation statute is manifest. The statute confers an unprecedented degree of power on the state to intrude itself into the private child-rearing decisions of intact families. Requiring only a finding that "the best interests of the child" are furthered, Washington's visitation statute empowers state courts to substitute their judgments for that of fit parents about who can maintain relationships with, and therefore influence the morals and values of, the parents' children.

Parental rights historically have only been subject to state intrusion when parents are harming or threatening harm to their children. The requirement of harm is the only safeguard that parents have against the sort of pervasive state interference in parenting decisions authorized by Washington's visitation statute. In the absence of harm to the child, the state has no authority to intrude into the parenting process. The lower court properly held Washington's visitation statute unconstitutional.

ARGUMENT

I. Parental Rights Are At Their Fullest And Should Be Most Shielded From State Interference Where, As In This Case, Parental Responsibilities Have Been Consistently Discharged and The Child Lives With A Fit Unitary Family.

Parental rights are most unassailable when parents fulfill their duty to raise their children in a stable home. The history and culture of American, and indeed much of western, civilization has extolled the primary role of parents

in raising children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Rooted in history and tradition as they are, parental rights are protected under the Fourteenth Amendment's Due Process Clause. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 533 (1925). A parent's right to the care and companionship of his child is so cherished that the right may not be terminated in the absence of stringent procedural safeguards. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (due process requires that parental rights may not be terminated unless state shows at least clear and convincing evidence that parents are unfit); *MLB v. SLJ*, 519 U.S. 102 (1996) (parental rights are of such basic importance that due process is violated when mother lost opportunity to appeal order terminating her parental rights because she could not pay appeal costs).

This Court's decisions in *Meyer* and *Pierce*, recognizing the Due Process Clause's protection of parental rights, were decided at a time in this nation's history when the vast majority of children were born into a traditional family created by marriage between a man and woman. There was, comparatively speaking, a fair degree of moral consensus about how children should be brought into the world and how they should be raised. Defining the scope of parental rights undoubtedly would have seemed unnecessary in a nation bereft of rampant illegitimacy, varied reproductive technologies, and numerous alternative lifestyles.

In modern times, however, this Court's decisions have recognized that the Due Process Clause does not confer unqualified parental rights on every person who bears or sires a child. For example, in both *Quilloin v. Walcott*, 434 U.S. 246 (1978) and *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court declined to hold that unwed fathers had full parental rights where the fathers never shouldered any significant responsibility for the child's well-being. In

Michael H. v. Gerald D., 491 U.S. 110 (1991), the Court held that a single man who fathered a child in an adulterous affair did not have full parental rights with respect to that child. 491 U.S. at 123-25.

Petitioners assert that this case raises questions similar to that raised in *Michael H.*, concerning the scope of parental rights under the Due Process Clause, because this case involves a facial challenge to § 26.10.160(3). According to Petitioners,[1] the issue before this Court is whether there is any set of circumstances under which the statute would be constitutional. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Assuming this case raises a facial challenge to § 26.10.160(3) and therefore raises questions about the perimeters of parental rights, the appropriate method of determining those perimeters is the history and traditions analysis employed in this Court's cases addressing substantive due process rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (The nation's history, legal traditions, and practices provide the "crucial guideposts for responsible decisionmaking").

A. The Contours of Parental Rights Must Be Defined In the Light of the History and Traditions Which Gave Rise to Those Rights.

As a substantive due process right, the scope of a parent's right to raise his child must be delineated in the light of the history and tradition which gave rise to the right. *See Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

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[1] See Troxel Br. At 19. Nothing in the lower court's opinion indicates that respondent pursued a facial challenge to Wash. Rev. Code § 26.10.160(3).

Substantive due process analysis has two components. First, a thorough review of the nation's history and tradition is required to determine whether the asserted right is "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Id.* at 719. Second, there must be a "careful description of the asserted fundamental liberty interest." *Id.* (Court held that the right asserted was properly described as the "right to commit suicide," not the more general and vague "right to choose a humane, dignified death").

As *Meyer* and *Pierce* held, the general concept of parental rights is firmly rooted in the tradition and history of this nation. 262 U.S. at 399; 268 U.S. at 533. What *Meyer* and *Pierce* did not discuss, quite understandably given American society at that time, was the second prong of substantive due process analysis, how the asserted interest should be described in various contexts. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1991), a plurality of the Court addressed, for the first time, the question whether the scope of parental rights depends on the circumstances surrounding the parenthood. There, a single man, Michael, fathered a child through an adulterous affair. The child was born into an intact family, and her legal father, Gerald, acknowledged her as his own. Nevertheless, over much of the child's early years, Michael maintained a fatherly relationship with her and held her out as his own, even while Gerald did the same. A blood test established that the child was Michael's. 491 U.S. at 113-114. When the child's mother and Gerald wanted to stop all further contact between the child and Michael, Michael argued that his parental rights under the Due Process Clause were infringed by California's evidentiary rule barring Michael from challenging the child's legitimacy. *Id.* at 116.

Presaging *Glucksberg*, the plurality's analysis incorporated a careful and very specific description of Michael's asserted liberty interest. Rejecting a general characterization of Michael's claim as a parental rights

claim, the plurality confined its inquiry to the nation's historical traditions regarding the rights of an "adulterous natural father." *Id.* at 127 n.6.

Michael had argued that the Court's cases conferred parental rights on parents whenever there was biological parenthood plus an established relationship. *Id.* at 123 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson,* 463 U.S. 248 (1983)). The plurality rejected this characterization of the Court's cases, holding instead that its decisions rested "upon the historic respect–indeed, sanctity would not be too strong a term–traditionally accorded to relationships that develop within the unitary family." *Id.* at 123. The plurality cited *Stanley* as an example of the Court's solicitude for family integrity because the Court struck down a state's attempt to remove a deceased mother's children from the custody of their father who had lived with and supported the children for 18 years. *Id.*; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is firmly rooted in this Nation's history and tradition.").

The plurality also noted that throughout the nation's history, states had protected intact families against the sort of claim Michael asserted.

> What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made."

Id. at 125.

Section 26.0.160(3) is a very broadly worded statute which confers the right on "any person," "at any time," to seek visitation with a child, regardless of the child's familial status. Section 26.0.160(3) is unconstitutional as applied to Tommie Wynn. Resolving a facial challenge to the statute, however, requires this Court to determine whether there are any circumstances in which the statute could be constitutional, which may in turn require an analysis of the scope of parental rights. As in *Michael H.*, such an analysis necessitates a review of the history and traditions from which parental rights arose.

B. This Nation's History and Traditions Establish that Parental Rights Are a Correlative of Parental Duties That Arise in the Context of Unitary Families.

Parental rights existed at early common law only in the context of the traditional family, consisting of married parents and their children. *See* Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases,* 49 Okla. L. Rev. 29, 35 (1996). Blackstone's Commentaries reflect the view that reciprocal duties and privileges between parents and children are an inherent part of family life. The relationship between husband and wife, and between parent and child is "founded in nature." Moreover, the relationship between parent and child is inextricably linked to the union of the husband and wife by virtue of being "consequential to marriage ... and its principle end and design." 49 Okla. L. Rev. at 37 (quoting 1 William Blackstone, Commentaries 410). As Professor Bohl observes,

> for Blackstone, as for other common law authorities, a comprehensive set of mutual obligations and benefits running between

> parents and children lie within the realm of family life. Parents must first maintain their children, a duty imposed 'not only by nature herself' but by the parents' own 'proper act' in bringing children into the world. Blackstone notes that although the "laws of all well regulated states" enforce this obligation, the natural and insuperable degree of affection which providence awakens in the "breast of every parent" accomplishes this end more effectively than any law. Parents must also protect their children, a natural duty. Parents' final and most important duty is to give children "an education suitable to their station in life."

Id. at 37 (citing Blackstone's Commentaries).

The early common law view that parental rights are correlative of parental duties, as well as the right to marry, is reflected in a number of this Court's early decisions. In *Meyer,* for example, the Court coupled the right to marry with the right to bring up children. 262 U.S. at 399. Similarly, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), this Court found the right to bear children to be inextricably linked with the right to marry. "Marriage and procreation are fundamental to the very existence and survival of the race." 316 U.S. at 541. In *Pierce*, this Court tied parental rights to parental responsibilities. Only those who "nurture [the child] and direct his destiny have the right, *coupled with the high duty,* to recognize and prepare him for additional obligations." 268 U.S. at 535 (emphasis added).

That parental rights are inextricably linked with parental duties and, to a lesser degree, an intact familial unit is also implicit in this Court's later decisions involving parental rights. In assessing the strength of family and parental rights, the Court has stressed the importance of

relationship and mutual responsibility among family members.

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man."... It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary *function and freedom* include preparation for obligations the state can neither supply nor hinder. The *integrity of the family unit* has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

Stanley v. Illinois, 405 U.S. 645, 651 (1972) (father who cared for and supported his children, as well as their mother, had parental rights) (emphasis added) (citations omitted). *See also Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson,* 463 U.S. 248 (1983) (unwed fathers who shouldered no parental responsibilities had no parental rights); *Caban v. Mohammed*, 441 U.S. 380 (1979) (same); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)(right to familial integrity may not be infringed by zoning ordinance barring grandmother from living with grandsons, whom she cared for and raised).

Finally, this Court's rejection of *Michael H.*'s parental rights claim properly tied parental rights with correlative parental duties, including the most fundamental duty of all, which is to bring a child into the world under circumstances which best enable a parent to fulfill his other responsibilities toward that child. Viewed in totality, this Court's cases are consistent with the common law view that parental rights are relational rights, based on reciprocal

duties, not on the individual interests of a parent. *See* Bohl, *supra*, 49 Okla. L. Rev. at 44.

In similar vein, the state historically has had no power to intrude into the relational rights between parent and child unless the parents harmed or threatened harm to the child. Neither the state's parens patriae power nor its police power may be exercised absent a determination that parental decisions will or may harm the child. This Court's decisions in *Yoder, Meyer*, *Pierce*, and *Prince* all reflect the historical view that only threatened harm to the child justifies state interference in the parent-child relationship. In *Yoder*, for example, this Court's decision was predicated on the determination that Amish children would not be harmed by receiving an Amish education, rather than a public education. 406 U.S. at 230 (state may intervene only "if it appears that parental decisions *will jeopardize the health or safety of the child, or have the potential for significant social burdens*") (emphasis added). Likewise, in *Pierce,* the Court held that the parents' decisions to send their children to parochial schools were not harmful to the children. 268 U.S. at 534; *see also Meyer,* 262 U.S. at 402-03 ("proficiency in a foreign language ... is not injurious to the health, morals, or understanding of the ordinary child"); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944) (mother's conviction under state child labor law was necessary to protect the child from harm). Of course, the state's power to terminate parental rights altogether hinges on a proceeding encased in substantial procedural protections to determine whether the parents have inflicted substantial harm on the child. *See, e.g., MLB v. SLJ*, 519 U.S. 102 (1996).

Petitioners argue that *Meyer, Pierce,* and *Yoder* are distinguishable because the infringement on parental rights in those cases was great, involving intrusions on the parents' right to control the religious upbringing and the education of their children. By contrast, petitioners claim that

Washington's visitation statute authorizes only a little intrusion because requiring visitation with third parties does not implicate the parents' prerogative to control the religious upbringing or the education of their children. Troxel Br. at 24-25. Petitioners' argument reveals a cramped and highly compartmentalized view of child-rearing. As any parent will attest, inculcating values, religious or not, and educating children necessarily require parents to exercise control over their children's associations. It is specious, if not disingenuous, to contend that forcing parents to maintain relationships between their children and third parties has no impact on "core" parental rights.

The requirement of harm is constitutionally essential to protect against state intrusion into the child-rearing decisions of fit parents in intact families. For the state to respect parental rights only as long as the state approves parental decisions is to emasculate parental rights. Because no finding of harm to the child is required, Washington's visitation statute allows state courts to second-guess parental determinations concerning the relationships children will maintain. The state thereby usurps the child's family's prerogative to influence the child's character and values by controlling the child's associations. Washington's visitation statute reflects a view of parental rights closer to Plato's ideal of children being raised by the state than to the historic sanctity accorded to the family in this Court's decisions. *See Meyer*, 262 U.S. at 390 (Platonic ideal of children raised by state does "violence to both the letter and spirit of the Constitution').

II. The Washington Supreme Court Properly Held that the State May Not Enforce a Third Party Visitation Order Against An Intact Family That Has Discharged Its Responsibility to Care for Its Children.

The lower court properly held that § 26.10.160(3) is unconstitutional as applied to Tommie Wynn. However unstable the Troxel childrens' beginning may have been, Ms. Wynn did not abdicate her responsibility for their care to another. The children now reside in an intact family with their mother and adoptive father. Consequently, there should be no diminution of Ms. Wynn's parental rights.

While the "best interests of the child" standard may be proper in some divorce-custody cases where state intervention is necessary because the parents can no longer agree to raise the children together in a stable family home, it is unconstitutional here. The lower court properly held that any state intrusion into Ms. Wynn's parental rights must be justified by a compelling state interest. Allowing state intrusion into the Wynn's private decisions about whom their children may visit because the state believes it would be in the children's "best interest" does not rise to the level of a compelling state interest. This Court has emphasized the rigor of strict scrutiny: "First Amendment rights are entitled to special constitutional solicitude," and the Supreme Court has "required the most exacting scrutiny" in cases where state action burdens a fundamental right. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Strict scrutiny is not "watered ... down but really means what it says." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1992) (quotations omitted).

Thus, under strict scrutiny, only clear evidence of a threat of harm to the Troxel children could justify an award of visitation rights to the Troxels in this case. There has been no such showing in this case. The lower court correctly

held that § 26.10.160(3) is unconstitutional when applied to fit intact families, such as Ms. Wynn's.

CONCLUSION

Washington Rev. Code § 26.10.160(3) is an unprecedented expansion of state power to intrude into the child-rearing decisions of fit intact families. The lower court's decision holding the statute unconstitutional should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF NORTHWEST WOMEN'S LAW CENTER, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, NATIONAL CENTER FOR LESBIAN RIGHTS, AND THE WOMEN'S LAW CENTER OF MARYLAND, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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This *amicus curiae* brief is submitted in support of the Northwest Women's Law Center, *et al.* By letters already filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE* [1]

Amici are public interest legal rights and advocacy organizations that seek to protect and advance the legal rights of women.[2]

This case is important to *Amici* because it involves a Constitutional issue of first impression: whether parental autonomy includes the right of parents to decide who their children will visit and under what circumstances. *Amici* acknowledge the importance of parental autonomy to ensure that parents can decide how to raise their children free from governmental interference. *Amici* recognize this need to protect parental rights because *Amici* have too often seen the rights of single mothers, who have few resources, trampled when an ex-boyfriend or a grandparent seeks to force visitation. *Amici* also recognize that governmental

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[1] Individual statements of interest of each *amicus* are attached hereto as Appendix A.

[2] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

interference may at times be necessary to protect the rights of non-biological co-parents, such as non-biological lesbian mothers, to maintain relationships with their children. *Amici* believe these individuals play a parent-like role in the child's life that is entitled to constitutional protection. The courts must protect and balance the legitimate interests of each where the best interest of the child is at stake.

SUMMARY OF ARGUMENT

The Washington Supreme Court properly concluded that Washington's third-party visitation statute, R.C.W. 26.10.160(3), is unconstitutional when applied to visitation petitions brought by third parties who do not have a *de facto* parental relationship with the child. A *de facto* parent is a person who has actually parented the child for a considerable time. *See infra,* p. 10-11. *De facto* parents differ from third parties who may play a significant but lesser role in a child's life. When third party visitation statutes are applied to third parties who are not *de facto* parents, the statute unconstitutionally interferes with parental autonomy.

Visitation petitions brought by *de facto* parents raise parental interests similar to those arising in custody and visitation disputes between biological parents. In such

cases, interference with the custodial parent's autonomy may be justified by the *de facto* parent's competing rights. When the Washington third party visitation statute is applied to those relatively limited cases involving *de facto* parents, the "best interest of the child" standard properly balances the competing parental interests and the statute is constitutional.

ARGUMENT

I. THE WASHINGTON STATE THIRD PARTY VISITATION STATUTE, WHICH ALLOWS FOR VISITATION BY ANY PERSON AT ANY TIME, IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

This Court has long recognized the constitutionally protected liberty interests of parents "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Parenting decisions are among the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974). Indeed, this right is so significant that it continues to exist even when parents lose custody of their children to the state. *Santosky v. Kramer*, 455 U.S. at 754. Constitutional

protection of parental autonomy strengthens the family "by encouraging parents to raise their children in the best way they can by making them secure in the knowledge that neither the state nor outside individuals may ordinarily intervene." Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. Rev. 879, 879-80 (1984).

The state may interfere with parental autonomy only through the exercise of its police or *parens patriae* powers. In *Prince v. Massachusetts*, 321 U.S. 158, this Court recognized there are circumstances in which the state as *parens patriae* has a compelling interest in protecting the safety of children and that this interest may justify the state's interference with parental autonomy. However, for such interference to be constitutional, it must be "narrowly drawn" to meet the state interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

The broad application of third party visitation statutes such as Washington's unconstitutionally infringes upon the constitutional rights of parents to the "custody, care and nurture of [their] child." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), quoting *Prince v. Massachusetts*, 321 U.S. at 166. The state lacks a compelling interest to infringe upon

parental autonomy where the third party petitioner is not a *de facto* parent. Requiring a parent (whether legal or *de facto*) to provide visitation with a third party forces a significant intrusion into parental autonomy. "[I]t is the day-to-day contact between parents and child, and the relationships grounded in that ordinary round of daily life which demand the Court's attention." Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 Okla. L. Rev. 29, 51 (1996). "Allowing the government to force upon an unwilling family a third party, even when the third party happens to be a grandparent, is a significant intrusion into the integral family unit." *Herndon v. Tuhey*, 857 S.W.2d 203, 212 (Mo. 1993) (Covington, J., dissenting). Such an intrusion usurps the parent's role in directing the child's upbringing.

Because the state lacks a compelling interest in forcing parents to defend visitation petitions against third party petitioners who are not *de facto* parents, Washington's statute is unconstitutional if applied to permit such intrusions.

II. THIRD PARTY VISITATION STATUTES SUCH AS WASHINGTON'S ARE CONSTITUTIONAL WHEN APPLIED TO INDIVIDUALS WITH *DE FACTO* PARENTAL RELATIONSHIPS.

Nineteenth century notions of family and parenthood do not adequately reflect the reality of contemporary society or the needs of children and their families. Within the last three decades, this country witnessed "a dramatic erosion of the traditional concept that the 'family' is a heterosexual man and woman, who bear and raise children inside the legal institution of marriage." Barbara L. Shapiro, *"Non-Traditional" Families in the Courts: The New Extended Family*, 11 J. Am. Acad. Matrim. Law. 117 (1993). Gone are the days of old-fashioned family configurations comprising one mother and one father who are married to one another for the rest of their lives. In today's society, men and women marry, divorce, and remarry. They cohabit and raise children together without ever marrying. Grandparents raise their grandchildren when one or more of the parents is unavailable. Lesbian and gay partners live together and raise their children together without the ability to marry, even if they would choose to do so.[3]

[3] Family Pride Coalition, an organization whose members are individual and families including gay and lesbian parents and blended

For more than two decades, this Court has recognized that the constitutional notion of "parent" is not limited strictly to biological or adoptive parents. In fact, the Constitution protects those who have actually parented the child, whether biologically related to the child or not. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents **sharing** a household along with parents and children has roots equally venerable and equally deserving of constitutional protection." *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (emphasis added). "Decisions concerning child rearing, which [many cases] have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives . . . who may take on **major** responsibility for the rearing of the children." *Id.* at 505 (emphasis added). *See also*, *Michael H. v. Gerald D.*, 491 U.S. 110, 123, n.3 (1989) (the Constitution protects "the household of unmarried parents

and extended families, estimates there are approximately two million gay and lesbian parents raising three to five million children under the age of eighteen. *See also, Developments in the Law – Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1629 (1989) (estimating that three million lesbian and gay men in the United States are parents) (citing *American Bar Association Annual Meeting Provides Forum for Family Law Experts*, 13 Fam. L. Rep. (BNA) 1512, 1513 (Aug. 25, 1987)).

and their children"); *Lehr v. Robertson*, 463 U.S. 248 (1983) (*de facto* parent is entitled to substantial due process protection, but mere existence of biological link does not merit equivalent protection); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (noting that bonds arising in unmarried families are "often as warm, enduring, and important as those arising within a more formally organized family unit"); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999), cert. denied *L.M.M. v. E.N.O.*, -- S.Ct. --, 1999 WL 783931, 68 USLW 3323, 68 USLW 3326 (U.S. Mass. Nov. 15, 1999) (court has equity power to award visitation to non-biological lesbian mother who is *de facto* parent; visitation does not violate biological mother's constitutional right to parental autonomy); *In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wis. 1995) (non-biological lesbian mother may seek visitation with child she co-parents if she can establish a *de facto* parent relationship and that biological mother is denying visitation).

In *Moore* and other noted cases acknowledging the rights of *de facto* parents to assert parental rights, this Court reviewed the nature of the relationship between the *de facto* parent and the child(ren), not solely the presence or absence of a biological link. When the *de facto* parent held himself out as the "natural" parent, this Court acknowledged the

importance of the relationship and accorded it constitutional protection. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978). Even when the *de facto* parent knew she was not the natural parent, but had taken a parent-like role in the child's life, this Court held that the Constitution protects such relationships. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

Conversely, where biological parenthood is unaccompanied by actual caregiving, biology will not solely determine the parent's constitutional interest in parental decision-making. *See, Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (constitutional to deny biological father parental rights when *de facto* father lived with biological mother and raised child as his own); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (same); *Lehr v. Robertson*, 463 U.S. 248 (1983) (distinguishing mere biological tie from actual exercise of parental responsibility). Biological parenthood alone is not determinative of parenthood, and non-biological parents who have established a *de facto* parental relationship are entitled to constitutional protection as parents.

Recognizing a *de facto* parent's rights to visitation despite the objections of the biological parent does not

impermissibly interfere with parental autonomy; furthermore, that recognition advances important constitutional rights of the child and the *de facto* parent.

> The recognition of de facto [sic] parents is in accord with notions of the modern family. An increasing number of same gender couples . . . are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto [sic]. Thus, the best interests calculus must include an examination of the child's relationship with both his legal and de facto [sic] parent.

E.N.O. v. L.M.M., 711 N.E.2d at 891.

Amici propose the following standard to determine *de facto* parenthood to ensure that states do not impermissibly interfere with parental autonomy and to balance the rights of individuals who have established a parent-like relationship with the child. A *de facto* parent will be able to demonstrate:

> (i) a significant mutually affectionate bond with the child; and
>
> (ii) a relationship enduring over considerable time that is significant in light of the child's age, developmental level and other circumstances; and

> (iii) a bond formed for reasons primarily other than financial compensation, and with the consent of the legal parent or as a result of the unavailability or inability of any legal parent to perform caretaking functions; and
>
> (iv) the performance of ongoing caretaking functions, such as attending to the child's daily needs, assisting with or arranging the child's educational needs, assisting the child to develop and maintain interpersonal relationships, acting in the child's welfare, assisting with the child's behavioral development and disciplinary needs, arranging for the child's health care needs.

Where an individual has played a parent-like role in a child's life and continuation of that relationship serves the best interest of the child, third party visitation statutes such as Washington's satisfy the state's compelling interest in protecting the welfare of the child and use the narrowest means necessary to do so. *See, Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) ("the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association . . . .").

In determining the best interest of the child, Washington laws require courts to consider abuse, domestic violence, alcohol and drug abuse and other causes for

restricting residential time. *See*, R.C.W. 26.09.191(2)(a)[4]. To ensure that parents have the ability to raise concerns regarding the *de facto* parent's ability to safely parent the child, the same considerations should apply to determine visitation petitions between legal parents and *de facto* parents. When third party visitation statutes such as Washington's are narrowly applied to *de facto* parents who establish that visitation is in the child's best interest, they are constitutional.

III. NARROWLY CIRCUMSCRIBING COURT ACCESS BY THIRD PARTIES IS ESSENTIAL TO PROTECT PARENTAL AUTONOMY.

Absent a showing of *de facto* parenthood,[5] the state may not constitutionally require that the parent provide visitation with the child, even if the visitation were to be in

[4] The pertinent section of the statute is provided for the convenience of the Court as Appendix B.

[5] *Amici* take no position in this case as to whether an individual who has not established a *de facto* parent relationship with a child, but nonetheless has established a substantially significant relationship with the child, should be permitted to seek visitation. However, *Amici* believe that the court should award visitation in those cases only if the third party can meet narrowly crafted and distinct factors that the court must consider beyond mere best interest of the child. The application of a higher substantive standard to third parties is necessary to protect the parent's constitutional right to parental autonomy and to overcome problems inherent in the broad application of these statutes, as explained in section III, pp. 12 - 25. This question is not before the Court today.

the child's best interest. As the Washington Supreme Court found, allowing visitation under such circumstances would force parents to defend against any third party petitioners who sought to maintain contact with a child. *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998). Limited application of third party visitation statutes to *de facto* parents minimizes the problems inherent in a statute that gives courts unfettered discretion. This limitation decreases judicial usurpation of parental decision-making and the harmful airing of family disputes. Application to *de facto* parents also limits potential risks to domestic violence victims and their children and minimizes the gender bias in decision-making. Finally, courts' failure to properly analyze the relationship between the third party and child, and the economic hardship to single mothers opposing visitation, buttress the argument for narrow application of third party visitation statutes.

III. A. LIMITED APPLICATION OF VISITATION STATUTES TO *DE FACTO* PARENTS MINIMIZES JUDICIAL USURPATION OF PARENTAL DECISION-MAKING.

Parental decision-making must be protected from interference by those whose relationships with the children are characterized by occasional visits, communications or

overnight stays. These relationships do not demonstrate the level of care, participation and affection required to permit courts to override parental decision-making.

> Some parents and judges will not care if children are physically disciplined by the grandparents; some parents and judges will not care if the grandparents teach children a religion inconsistent with the parents' religion; some judges and parents will not care if the children are exposed to or taught racist beliefs or sexist beliefs; . . . But some parents and some judges will care. Between the two, the parents should be the ones to choose not to expose their children to certain people or ideas, and without a showing that this deprivation has harmed the child in some way beyond a per se disassociation with the grandparents, the family's private decision-making should not be tried in a court of equity. Instead, the grandparents' request and justification for visitation should be subject to scrutiny and should be proved necessary to the welfare of the child.

Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. Louisville J. Fam. L.393 (1985-86).

This case demonstrates the validity of *Amici's* argument that application of visitation statutes should be limited to individuals who can establish a *de facto* parental relationship with a child. Here, the mother preferred the children not have overnight visits at their grandparents'

home; indeed, prior to their father's death, the children had never done so without their father being present. Pet. Brief at 2-3. By requiring that the mother provide overnight visits despite her own beliefs about what is in her children's best interest, the court imposed its notion of best interest of the child in place of the mother's.

Application of third party visitation statutes to those individuals who demonstrate a *de facto* parental relationship would limit judicial override of parental decision-making to those cases where competing parental rights justify the state's compelling interest in interfering with parental autonomy.

III. B. BROAD APPLICATION OF THIRD PARTY VISITATION STATUTES WILL FORCE PARENTS TO DEFEND AGAINST UNDESERVING APPLICANTS AND RESULT IN HARMFUL AIRING OF FAMILY DISPUTES.

Allowing third party petitions by persons without a *de facto* parental relationship will force parents to defend against petitions by undeserving applicants, such as an abusive ex-partner who exploits the court system to continue his pattern of control over his victim. A batterer deprived of the opportunity to physically abuse his victim will wreak emotional and financial havoc on his victim. When third party visitation statutes are permissively

applied, the law empowers the batterer to manipulate the court system. The batterer may convince his parents to seek visitation with his child so he can seize visitation beyond that awarded in the divorce proceedings. *See*, *Drennen v. Drennen*, 557 N.E.2d 149 (Ohio App. 1988) (court upheld denial of visitation to paternal grandparents who had close relationship with violent father and had allowed father unsupervised access to child in violation of agreement); *Hughes v. Hughes*, 463 A.2d 478 (Pa. Super. 1983) (appellate court upheld denial of visitation to paternal grandmother, believing it was a ruse and "an attempt to gain through the back door what is not possible by the front"). Whether the grandparents are ultimately successful in their efforts is irrelevant: the mother will have already suffered unwarranted economic and emotional hardship in defending her parenting decisions in court.

Additionally, third party visitation statutes that are broadly applied open the door to the harmful airing of family discord. A hypothetical case: two parents agreed between themselves that the maternal grandparents would never have unsupervised or unlimited visitation with their grandchild because of the mother's molestation by the grandfather. The mother never disclosed this abuse to her parents or other family members. Upon the mother's death,

the maternal grandparents sought unsupervised visitation. The broad application of third party visitation statutes such as Washington's would force the father to divulge the sexual molestation to protect his child. While a court might ultimately deny visitation, the hearing itself would be harmful. *See*, Pet. Brief at 6, n.10 (Petitioners concur that even in the instant case the public airing of family disputes would complicate relations between the individuals involved).

III. C. STATUTES THAT GIVE COURTS UNFETTERED DISCRETION OFTEN RESULT IN GENDER-BIASED DECISIONS.

Broad application of third party visitation statutes that are not limited to those third parties who have established a *de facto* parental relationship with the child also implicitly allow gender biases to influence trial court decisions. Petitioners would have this Court believe that trial judges apply these broad statutes reasonably and consistently. Pet. Brief at 13-17. In fact, what too often determines the outcome is the gender of the parent opposing the visitation. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 Conn. L. Rev. 1315, 1333-34 (1994). "In defining the best interests of the child in the custody of a

single mother, courts frequently ignore a mother's opinion about the people with whom the child should spend time." *Id.* at 1334.

When analyzing whether to allow visitation over a parent's objection, courts defer less to mothers than to fathers. Courts frequently decide that the mother cannot deny the grandparents access to the children based on the courts' belief that such relationships are important. This is true even when there is animosity between the parties. In too many cases, courts fail to scrutinize the extent of the grandparents' involvement in the child's life.[6] *Id.* at 1335-36.

In contrast, courts show deference to fathers, allowing visitation over a father's objections only if the grandparents cohabited or were closely involved with the child. Even when the grandparents have been significantly involved in the child's life, courts still deny visitation if the animosity between the father and the grandparents is deemed too great.[7] *Id.* at 1343.

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[6] *See, Johansen v. Lanphear*, 464 N.Y.S.2d 301 (N.Y. App. Div. 1983); *Commonwealth ex rel. Miller v. Miller*, 478 A.2d 451 (Pa. Super. Ct. 1984); *Barry v. Barrale*, 598 S.W.2d 574 (Mo. App. 1980).

[7] *See, Commonwealth ex rel. Zaffarano v. Genaro*, 455 A.2d 1180 (Pa. 1983); *Kudler v. Smith*, 643 P.2d 783 (Col. Ct. App. 1981); *Cockrell v. Sittason*, 500 So. 2d 119 (Ala. Civ. App. 1986); *Benner v. Benner*, 248 P.2d 425 (Cal. App. 1952); *In re Marriage of Weddel*, 553

Thus the purportedly gender-neutral legal framework operates in a gender-biased fashion.[8] This often results in male judges expropriating women's choices. "Gender is fundamental to views of sexual difference in our culture; judges cannot be free of gender associations." Steven H. Miles and Allison August, *Courts, Gender and the "Right-to-Die,"* 18 Law, Medicine and Health Care 85, 92 (1990). Given the potential for gender bias in these cases, this Court should prohibit the broad application of visitation statutes to individuals who cannot demonstrate a *de facto* parental relationship with the child.

N.E.2d 213 (Ind. Ct. App. 1990); *Olepa v. Olepa*, 391 N.W.2d 446 (Mich. Ct. App. 1986).

[8] The gender bias identified by Czapanskiy, while disturbing, is not surprising when other "neutral" standards are analyzed with a critical eye. For example, the Washington State Supreme Court, years before other states recognized the Battered Women's Syndrome, assessed whether in self-defense claims the "reasonable man" standard was sufficiently neutral to encapsulate a women's perspective of "reasonable". In its decision, the court found that the "neutral" standard did not incorporate the perspectives of women. *State v. Wanrow*, 559 P.2d 548 (Wash. 1977). Thus, the court recognized that legal standards appearing neutral at first often work against women in application.

A similar outcome was found in a study of right-to-die cases conducted by Dr. Steven Miles. Steven H. Miles and Allison August, *Courts, Gender and the "Right-to-Die"*, 18 Law, Medicine and Health Care 85 (1990). In that study, Dr. Miles identified 22 appellate court decisions in which courts were asked to reconstruct the wishes of legally incompetent individuals. Although all the individuals had said essentially the same thing to family and friends regarding their desires if ever in a vegetative state, Dr. Miles found that the courts applied the

III. D. ASSUMPTIONS ABOUT THE BENEFITS OF GRANDPARENT VISITATION FREQUENTLY RESULT IN INTRUSIONS UPON PARENTAL AUTONOMY.

In assessing a request for grandparent visitation, courts often articulate assumptions that all grandchildren benefit from a relationship with their grandparents and that visitation is in the best interest of the child.[9] These beliefs buttress courts' opinions that grandparent visitation statutes are constitutional. Courts essentially heighten the rights of grandparents to constitutional stature. This reasoning makes it difficult for parents to successfully challenge a request for grandparent visitation.

By assuming that visitation by grandparents is automatically in the best interest of children, courts unwittingly shift to the parent opposing visitation the burden of showing that such visitation is not in the child's best interest. Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent*

"neutral" evidentiary standards differently to men and to women. *Id.* at 87.

[9] *See, Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 323 (N.Y. App. Div. 1984); *Commonwealth ex rel Miller v. Miller*, 478 A.2d 451, 455 (Pa. Super. 1984); *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992); *Herndon v. Tuhey*, 857 S.W.2d 203, 210 (Mo. 1993); *Campbell v. Campbell*, 896 P.2d 635, 643 (Utah App. 1995); *Sightes v. Barker*, 684 N.E.2d 224, 230-31 (Ind. App. 1997); *Roberts v. Ward*, 493 A.2d 478, 482 (N.H. 1985).

Visitation Cases, 40 Okla. L. Rev. at 78. Instead, courts should analyze the nature of the relationship between the third party and the child. Only individuals who demonstrate a) a *de facto* parental relationship with the child and b) that visitation is in the best interest of the child should be awarded visitation over a parent's objection.

Equal application of third party visitation statutes to third parties and to *de facto* parents can often lead to absurd results. Awarding visitation to the first person to court may foreclose the opportunity of latecomers who establish a *de facto* parental relationship from obtaining visitation. Ultimately, parents will be unable to juggle the multiple demands visitation places on the family's life and courts will be forced to deny or reconfigure visitation for the wrong reasons.

As families and society evolve, "the nuclear family on which children in the past relied has become less common; '[m]ore varied and complicated family situations arise as divorces, and decisions not to marry, result in single-parent families, [and] as remarriages create step-families', making relationships with other family members all the more important." Pet. Brief at 9, quoting *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985). Petitioners' observation demonstrates the competing and never-ending

demands that may be placed on parents attempting to direct and control their own and their children's lives. Forcing parents to defend visitation attempts by any family members who play a role in or believe they are important in the child's life will "result in chaos for parents as they attempt to rear their children." *King v. King*, 828 S.W.2d 630, 635 (Lambert, J., dissenting).

While the grandparent-grandchild relationship may be important and pleasurable, it does not inherently rise to the level of significance in the child's life to warrant intrusion into constitutionally protected parental autonomy. Only where the grandparent has played a *de facto* parenting role in the child's life is the relationship entitled to constitutional protection. Czapanskiy, 26 Conn. L. Rev. at 1324.

Petitioners claim that the Fourteenth Amendment was never intended to prevent other family members from participating in family life, and that many communities, foster participation in family life by grandparents and other family members. Pet. Brief at 30-32 (noting such participation in Asian-American and Native American families). The Constitution cannot prohibit communities from voluntarily relying on extended family decision-making and participation. In fact, *Amici's* analysis would

allow those family members in these communities who have played a *de facto* parental role in the child's life to seek visitation. *Amici* are keenly aware of this concern because of their work with African-American grandmothers raising their grandchildren in the indefinite or permanent absence of the intervening generation. With these communities in mind, *Amici* submit that application of the statute is constitutional only when applied to *de facto* parents. Application in this fashion will usually allow those extended family members with *de facto* parental relationships to seek, and when appropriate, obtain visitation while minimizing improper intrusions upon parental autonomy based on false assumptions of the overriding importance of grandparent-grandchild relationships.

III. E. BROAD APPLICATION OF THIRD PARTY VISITATION STATUTES CREATES AN ECONOMIC HARDSHIP FOR THE PARENT OPPOSING THE VISITATION.

Broad application of statutes such as R.C.W. 26.10.160(3) requires parents to defend third party visitation requests regardless of the relationship between

the third party and the child. Even if the parent ultimately prevails, the financial cost to the family is enormous, as are the emotional and psychological costs to all parties, including the children.

The cost of litigation disproportionately burdens single mothers, who have a higher rate of poverty than single fathers or intact families.[10] Yet because most states require a break-up in the family before grandparent or third party visitation rights are triggered, it is most often single parents who are forced to defend these cases. The single parent must then use her limited resources and hire an attorney to defend her parental autonomy and parenting decisions or must appear in court *pro se*. In 1992, in Seattle, Washington, at least one party appeared *pro se* in 76% of family law cases.[11] Parents who represent

[10] In 1991, the number of families maintained by women below the poverty level was ten times as high as those maintained by men, and families maintained by women had the lowest median income of all family types ($16,692), compared to $40,995 for married couples and $28,351 for families maintained by men. *See*, U.S. Department of Labor, Women's Bureau, *Facts on Working Women* (visited Dec. 7, 1999) <http://www.dol.gov/dol/wb/public/wb-pubs>.

[11] *See*, American Bar Association, Standing Committee on the Delivery of Legal Services, *Responding to the Needs of the Self-Represented Divorce Litigant* 1, 8, Table 2 (1994). Seattle, WA is not alone in the high percentage of *pro se* litigants in family law cases. This statistic is repeated in urban cities across the country. *Id.* (on average, in 1992, 72% of divorce cases in sixteen urban cities had at least one party appear *pro se* and when only men had an attorney, women appeared *pro se* 83% of the time). *See also*, Final Report of the

themselves usually fare the worst in court, because they do not understand the legal system and they are ill-equipped to adequately represent their interests. Thus, even if the facts of a particular case do not support an award of visitation, a *pro se* litigant is less likely to succeed in averting a harmful result. Anything short of the narrow application of third party visitation statutes will result in economic hardship for single mothers.

California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts 140, 165-166 (1977) (85% of *pro se* litigants are women).

CONCLUSION

Amici respectfully request that this Court hold that Washington's third party visitation statute R.C.W. 26.10.160(3) is unconstitutional as applied in this case. The statute is constitutional if narrowly applied to individuals who a) have a *de facto* parental relationship with the child and b) can establish that visitation is in the best interest of the child. This application of the statute will shift courts' focus from their own biases and beliefs, and from usurpation of parent's decisions, to the proper constitutional analysis and respect for principles of parental autonomy as well as recognition of alternative families, all of which are essential to our society.

Respectfully submitted,

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December 10, 1999

APPENDIX

APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Northwest Women's Law Center is a non-profit public interest legal organization dedicated to advancing the legal rights of women through litigation, education, legislative advocacy and the provision of legal information and referral services. The Law Center provides these services to women throughout Washington State and the Pacific Northwest. Since its founding in 1978, the Law Center has been actively involved in family law issues. The Law Center has worked to protect the parental autonomy rights of single parents, particularly *pro se* litigants and domestic violence victims, and to protect the best interest of children. The Law Center also fights to ensure that individuals in long-term committed relationships, regardless of sexual orientation or marital status, receive equitable treatment under the law. Additionally, the Law Center works to protect the rights of grandparents raising grandchildren. Because of our work with these diverse communities, the Law Center understands the complexity of the issues in this case and is uniquely qualified to address the Court.

The Connecticut Women's Education and Legal Fund (CWEALF) is a statewide, nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,400 individuals and organizations. CWEALF seeks to join this brief as *amicus curiae* because of our long history of work on family law issues.

The National Center for Lesbian Rights (NCLR) is a national, non-profit legal organization dedicated to securing and protecting equal rights for lesbians and their families. Since 1977, NCLR has advocated on behalf of lesbian parent families and their children in the arenas of child custody and visitation, adoption and foster parenting, and health care and other family-related benefits. NCLR has a special commitment to ensuring that children who are born and raised in lesbian parent families are afforded the same rights and protections as all others, including the right to freedom from interference by relatives and other third parties, and the right to maintain a relationship with the child's *de facto* parent in the event of the biological parent's

death or incapacity or if the relationship between the parents dissolves.

The Women's Law Center of Maryland, Inc. (WLCMD), founded in 1971, is a nonprofit, public interest, membership organization of attorneys and community members that works to establish fair treatment for women and children under our laws. The WLCMD has worked to protect and preserve the rights of women and children by educating the public and the judiciary, monitoring compliance with the law, by seeking to change unjust laws and unjust lawmaking, and by implementing innovative legal services programs to pave the way to systematic change. The WLCMD has dedicated substantial effort to reforming family law and has been recognized for its innovative direct services and effective advocacy for families via its Kaufman Center for Family Law. The WLCMD is participating as an *amicus* in this case because of the WLCMD's support for a result that will protect the rights of parents who have played substantial roles in children's lives over time, both biological and *de facto*, from third parties whose involvement in children's lives does not rise to level of parent and whose interests should not interfere with parental autonomy.

APPENDIX B

Section 26.09.191(2)(a) of the Revised Code of Washington provides in pertinent part,

> The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct:
>
> (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions;
>
> (ii) physical, sexual, or a pattern of emotional abuse of a child;
>
> (iii) a history of acts of domestic violence as defined in [Washington's law] or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or
>
> (iv) the parent has been convicted as an adult of a sex offense under [relevant provisions of Washington's criminal code].

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No. 99-138

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DEC 13 1999
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

In the Matter of the Visitation of
NATALIE ANNE TROXEL and
ISABELLE ROSE TROXEL, Minors,
JENIFER and GARY TROXEL,

Petitioners,

—v.—

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF WASHINGTON

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Washington is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the right to family autonomy, both as direct counsel and as *amicus curiae*. This case raises those issues again. Its proper resolution is therefore a matter of direct concern to the ACLU and its members.

STATEMENT OF THE CASE

In December 1993, petitioners Jenifer and Gary Troxel filed a petition in Washington state court seeking a decree ordering that they be allowed visitation with Isabelle and Natalie Troxel, over the objections of the girls' mother, respondent Tommie Granville.[2] Isabelle and Natalie were one and three years old, respectively, at the time the petition was filed. Brief of Pet. at 1-2. The Troxels' son, Brad, was the father of the girls. He committed suicide in May 1993, six months before the Troxels filed their visitation petition.

Brad Troxel and Tommie Granville were never married, although they lived together intermittently. After their sepa-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Unless otherwise indicated, facts cited in this brief are taken from the opinion of the Supreme Court of Washington.

ration, Brad lived with his parents, and Isabelle and Natalie visited him in the Troxels' home on occasion. Although Isabelle and Natalie continued to visit the Troxels from time to time for a few months after Brad's death, a dispute soon developed between the Troxels and the children's mother, and she decided to limit visitation.

The Troxels then sought court-ordered visitation under RCW 26.10.160(3) and former RCW 26.09.240.[3] RCW 26.10.160(3) provides:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Former RCW 26.09.240 provides:

> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

After a hearing on the Troxels' petition, the trial court entered a visitation decree ordering visitation one weekend

[3] Subsequent to the filing of the Troxels' initial visitation petition, RCW 26.09.240 was amended to require that any nonparent seeking visitation show that he or she has a significant relationship with the child and to limit petitions to cases where the child's parent or parents has commenced an action for divorce, legal separation, or modification of a parenting plan. Washington Laws of 1996, ch.177, §1(1).

per month, one week during the summer, and four hours on each of the Troxels' birthdays. In addition, the court ordered Ms. Granville not to speak with her children about their father's suicide-death until she and the Troxels had agreed on a joint explanation. Brief of Pet. at 5. Finally, the court ordered Tommie Granville to notify the Troxels of the girls' school and extracurricular activities. Brief in Opp. to *Cert.* at 2.

Ms. Granville appealed, and while the appeal was pending she married Kelly Wynn. Mr. Wynn adopted Natalie and Isabelle in February 1996.[4]

The Washington Court of Appeals subsequently reversed the visitation order, holding that nonparents lack standing to seek visitation under Washington's statutes unless a custody action is pending. *In re Visitation of Troxel*, 940 P.2d 698 (Wash.App. 1997). The Troxels sought and were granted review by the Supreme Court of Washington. The Washington Supreme Court later held that the Troxels had standing to seek visitation, but that both RCW 26.10.160(3) and former RCW 26.09.240 violated Tommie Granville's right under the United States Constitution to decide how to rear her children. *In re Custody of Smith v. Stillwell*, 969 P.2d 21 (Wash.1998).[5]

[4] In light of the children's adoption by the mother's husband, there may be some question under Washington law as to whether the Troxels legally qualify as the children's grandparents. However, as discussed in Point IC below, this Court has never dwelt on such legal technicalities. Because the record suggests that the Troxels have maintained a grandparent relationship with the children, whether they fit the legal definition of grandparent is irrelevant to the issues before this Court.

[5] The Troxels' case was combined with two others, and styled by the Washington Supreme Court as *In re Custody of Smith v. Stillwell*, 969 P.2d 21 (Wash.1998).

The Troxels filed a petition for *certiorari* with this Court on July 5, 1999. The petition was granted on August 10, 1999.

SUMMARY OF ARGUMENT

Few ideas are more entrenched in our constitutional jurisprudence than the notion that parents, rather than the state, are presumptively entitled to make decisions about the best interests of their children. Plato, for one, thought otherwise. But, as this Court noted more than seven decades ago, Plato's "ideas touching the relations between individual and state were wholly different than those upon which our institutions rest." *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). Explaining that difference, this Court has repeatedly held: "It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The Washington state statutes challenged in this case are irreconcilable with that constitutional vision. They permit the state to substitute its own judgment regarding a child's best interests for the contrary judgment of the child's own parents, and to order visitation over the parents' objection with any third party that may petition the court. The intrusion on family autonomy created by this statutory scheme is a significant one. The decision about what role other adults will play in a child's life is a critical one for most parents, especially when the child is too young to make that decision independently. Nothing in our constitutional tradition permits the state to override those decisions merely because a judge disagrees.

To the contrary, this Court has recognized a broad right to family autonomy in numerous cases over the years.

Moreover, the Court's understanding of the parent-child relationship has never been limited to biology. Thus, the Court has distinguished between the constitutional rights of an unwed father who had no ongoing relationship with his biological children, *Lehr v. Robertson*, 463 U.S. 248 (1983), and the constitutional rights of an unwed father who helped raise his children for eighteen years. *Stanley v. Illinois*, 405 U.S. 645 (1972). The Court has also acknowledged that others can and do perform a parenting role in some families. In *Prince*, it was an aunt; in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), it was a grandmother; and in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), it was foster parents.

Amici recognize, of course, that the rights of parents are not absolute. We also recognize that the "best interest of the child" standard utilized in the Washington state statutes is a familiar one in family law. However, this is not a case in which the state has been forced to act as a referee between separating parents. Under those circumstances, we agree, the "best interest of the child" standard is an appropriate yardstick for resolving the competing parental claims. Nor is this a case where parental rights have been terminated and the state is attempting to develop an alternative parenting plan. And this is not a case where the state has invoked its police power or *parens patriae* power to protect children from serious harm.

Here, by contrast, there is no disagreement among parents nor any claim that respondent is unfit. The decisions she has made about how to raise her children may be wise or unwise. But, at least absent some showing of substantial harm to her children, respondent has a constitutional right to raise them on her own without state interference.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT LIMITS THE POWER OF STATES TO INTERFERE IN A PARENT-CHILD RELATIONSHIP AND INCLUDES A FUNDAMENTAL RIGHT TO FAMILY AUTONOMY IN CHILD-REARING DECISIONS

It is well established that the Due Process Clause protects family relationships from undue state interference. Moreover, there is a fundamental right to autonomy in parent-child relationships, which encompasses a parent's right to make decisions about child-rearing. Only when the state is pursuing a compelling interest may it replace the parent and take on responsibility for how a child will be raised. This Court has wisely recognized that the parent-child relationship is determined by the realities of family life and familial relationships, rather than by isolated factors such as biology, and has invoked the protections of the Due Process Clause with this principle in mind.

A. The Due Process Clause Of The Fourteenth Amendment Protects The Parent-Child Relationship

One need look no further than the constitutional reference point of extant tradition,[6] as articulated in this Court's cases over the past seventy-five years, to determine that the parent-child relationship is constitutionally protected and that the state can interfere in that relationship only in the service of a "powerful countervailing interest." *Stanley v. Illinois*, 405 U.S. at 651. In *Stanley*, this Court addressed the most drastic form of state interference -- termination of the parent-child relationship. Under Illinois law, custody of children born to an unwed mother automatically reverted to the state upon the mother's death, thus terminating the relationship between father and children regardless of father's fitness as a parent. Characterizing the constitutional interest in the parent-child relationship as "essential" and one of the "basic civil rights of man," *id.* at 651, this Court held that the Due Process Clause required that Stanley be proven unfit before his relationship with his children could be terminated by the state.

This Court used the same analysis ten years later in *Santosky v. Kramer*, 455 U.S. 745 (1982), a constitutional challenge to a New York statute that allowed termination of parental rights upon a showing, by a fair preponderance of the evidence, that a child had been "permanently neglected." The question in *Santosky* was whether a "preponderance of the evidence" standard was sufficient in light of the weighty

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[6] There has been much recent debate about the role of history and tradition in determining whether an asserted right can be located within the protections of the Due Process Clause. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997). Because the right of family autonomy is so plainly rooted in this nation's history and tradition, there is no need to revisit that debate here. Nevertheless, it is worth noting that a full historical analysis must take into account "what history teaches are the (continued...)

[6] (...continued)
traditions from which [society] developed as well as the traditions from which it broke." *Moore v. City of East Cleveland*, 431 U.S. at 502 (plurality opinion), quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). In that sense, as Justice Harlan pointed out, "tradition is a living thing." *Id.* at 542. Moreover, because "tradition is a living thing," even historically recognized rights may take different forms over time. Thus, in conducting an historical analysis under the Due Process Clause, it is important to "characterize relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989)(O'Connor & Kennedy, JJ., concurring).

constitutional interests at stake. Noting "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," *id.* at 753, the Court held that the Due Process Clause requires that the state support its allegations by at least clear and convincing evidence. *Id.* at 769. Thus, the New York statutory scheme was ruled unconstitutional.

B. The Constitutionally Protected Parent-Child Relationship Encompasses Family Autonomy In Child-Rearing Decisions

While the Due Process Clause places clear limits on the state's power to end a parent-child relationship, constitutional protections do not stop there. In addition, this Court has recognized the central importance of family autonomy and the strong constitutional interest of a parent in the "companionship, care, custody and management of his or her children."[7] *Stanley*, 405 U.S. at 651. Several of this Court's decisions specifically address family autonomy in child-rearing decisions.

In *Meyer v. Nebraska*, 262 U.S. 390, this Court considered the constitutionality of a Nebraska statute that prohibited the teaching of a foreign language to any student who had not graduated from the eighth grade. *Meyer* recognized the state's general interest in improving "the quality of its citizens" and the state's specific interest in training students in English. *Id.* at 401-02. Nonetheless, those state interests were outweighed by the fundamental right of parents "to control the education of their children." *Id.* Thus, the Nebraska statute was held to violate the Due Process Clause.

[7] This Court has not yet had the opportunity to address the child's constitutional interest in maintaining the parent-child relationship. *Michael H. v. Gerald D.*, 491 U.S. at 130 ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining a filial relationship"). Nonetheless, *amici* believe it is of equal constitutional magnitude to that of the parent.

This Court reached a similar conclusion two years later in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a case involving a constitutional challenge to an Oregon statute requiring parents to send their children to public schools. This Court had no difficulty holding that the statute violated the rights of Oregon parents under the Due Process Clause:

> Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 534-35 (citation omitted).

Almost a half century later, this Court reaffirmed the constitutional protections provided to parental decisions about child-rearing in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, parents who were Old Order Amish challenged the constitutionality of their criminal convictions under a Wisconsin statute requiring children to attend high school. The Yoders refused to send their children to high school because it conflicted with the Amish religion and way of life. This Court once again recognized that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232. This constitutional interest, together with the free exercise interests of Amish parents, were held

sufficient to override the state's strong interest in universal education.[8]

To be sure, a parent's right to raise her child as she sees fit is not absolute and may be overcome in some circumstances even when a parent is not unfit. For example, this Court has recognized that there are circumstances in which a child's own constitutional right to make important decisions for herself must take precedence over parental control. *See, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979)(state must provide opportunity for minor to seek court order allowing her to obtain abortion without parental involvement).

Moreover, under some circumstances the state may override a parent's child-rearing decision even in the absence of a countervailing constitutional interest. *Prince v. Massachusetts*, 321 U.S. 158, provides one example. In *Prince*, this Court was asked to determine whether the Due Process Clause prohibited Massachusetts from enforcing its child labor laws against Sarah Prince, a Jehovah's Witness who wished her niece and ward to accompany her and help her sell religious publications. While recognizing that there is a "private realm of family life which the state cannot enter," *id.* at 166, this Court nonetheless held that Massachusetts did not violate Mrs. Prince's constitutional rights by prosecuting her for violating the state's child labor laws.

Prince cannot be read as a charter, however, authorizing wholesale state intervention in a parent's judgments about child-rearing. Instead, *Prince* is best understood as an example of this Court's deference to a state's use of its police

[8] While the free exercise interests of the Amish parents were an important element of the *Yoder* decision, this Court has since explained that it would not have ruled as it did were it not for the Due Process Clause's protection of parental child-rearing decisions. *See Employment Development Division v. Smith*, 494 U.S. 872, 881 (1990).

power to protect children as a class from the dangerous conditions associated with child labor, a rampant social problem in many parts of the country in the first part of this century. *Id.* at 168. Indeed, this Court has limited *Prince* to a "narrow scope," recognizing that the decision was influenced by "the Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor . . ." *Yoder*, 406 U.S. at 229-30.

C. In Recognizing The Constitutional Protection Afforded To Parent-Child Relationships, This Court Has Focused On The Realities Of Family Life Rather Than Narrow Definitions Of Who Is A Parent

It is not fatal to an individual's quest for a court order preserving a relationship with a child that the individual seeking the court order may not, in fact, be a biological parent. While this Court has consistently invoked the Due Process Clause to protect parent-child relationships, it has never defined those relationships by biology alone. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. at 256. An approach to family that "disdains present realities in deference to past formalities, [] needlessly risks running roughshod over the important interests of both parent and child." *Stanley*, 405 U.S. at 657.

The constitutional protections accorded to the parent-child relationship and the right to family autonomy in child-rearing have been recognized whenever a parenting *relationship* in fact exists, regardless of legal technicalities.[9] In

[9] This does not change the position of the Troxels with regard to visita-
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Stanley, this relationship-based approach was applied on behalf of a father, when the Court struck down an Illinois statute that clung to historical formalities by providing that an unwed father was never a "parent" entitled to a fitness hearing before termination of parental rights. In rejecting the irrebuttable presumption that Illinois law embraced, this Court emphasized that the father in *Stanley* had lived with and raised his children for eighteen years, despite the fact that he never married the children's mother. Similarly, in *Levy v. Louisiana*, 391 U.S. 68 (1968), the Court struck down a Louisiana statute denying natural but "illegitimate" children the right to initiate a wrongful death action because, as the Court later explained in *Stanley*, 405 U.S. at 652, "familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."

This Court also adopted a functional approach in *Prince v. Massachusetts*, 321 U.S. 158, when it treated the relationship of Sarah Prince and her niece as that of parent and child. The Court allowed Mrs. Prince to invoke "the parent's claim to authority in her own household and in the rearing of her children," *id.* at 165, because she exhibited "motherlike" behavior in rearing the child and was the

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[9] (...continued)
tion, since they have never claimed that they maintained a parental relationship with respondent's children. However, because the Court's disposition of the Troxels' claims will influence the subsequent development of case law in the family arena, *amici* believe it is important to emphasize this Court's nuanced analysis of who may be afforded the protections inherent in the parent-child relationship. Ultimately, these matters will be settled largely by state courts. *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984). This Court's flexible approach, combined with vigilant protection of the family as required by the Due Process Clause, allows the states maximum latitude as they continue to experiment to identify the best approaches to rights and responsibilities in modern family life.

child's custodian. *Id.* at 162. Likewise, in considering what constitutional interest foster parents may have in maintaining a relationship with children in their care, this Court stressed that it is the *actual relationship* between adult and child that determines the family unit:

> Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child may exist even in the absence of blood relationship.

Smith v. Organization Of Foster Families, 431 U.S. at 844 (citation omitted).

Finally, in *Moore v. City of East Cleveland*, 431 U.S. 494, a plurality of this Court invoked the Due Process Clause to protect the relationship between a grandmother and the two grandsons she was raising in her home. East Cleveland's housing ordinance limited occupancy to single family dwellings and defined "family" in such a way that Mrs. Moore's was excluded. The fact that Mrs. Moore had taken on "major responsibility for the rearing of the children" and that the family occupied the same household was crucial to the Court's determination that the housing ordinance violated the Moore family's rights under the Due Process Clause.[10]

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[10] By contrast, this Court has rejected the claim that a biological connection, without anything more, is sufficient to establish a constitutionally
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This Court's relationship-based approach is supported by a strong state law tradition of focusing on the realities of family life when sorting through the rights and responsibilities of parents and children. State courts have repeatedly recognized the right of an individual who has maintained a parental relationship with a child to seek custody and/or visitation, regardless of legal relationship or biological connection to the child. Some of these cases have relied on an "equitable parent doctrine," under which a biological parent is estopped from denying the parenthood of a nonbiological parent if they have both acted as the child's parents.[11] Other state cases have granted visitation, absent a biological tie and over the objections of the biological parent, where a parent-child relationship developed, based on the *in loco parentis* doctrine.[12] These custody and visitation cases were presaged by an older body of state case law recognizing parent-child relationships, and assigning rights and responsibilities accordingly, in a broad range of circumstances.[13]

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[10] (...continued)
protected parent-child relationship. For example, *Lehr v. Robertson*, 463 U.S. 248, held that an unwed biological father who never took any part in the rearing of his child and who failed to register as the child's putative father was not constitutionally entitled to notice and hearing prior to the child's adoption by the mother's husband. And, in *Michael H. v. Gerald D.*, 491 U.S. 110, this Court denied parental status to a man who impregnated a woman married to another man, upholding the constitutionality of a California statute that presumed the child to be of the marriage. Justice Scalia contrasted the unmarried father in *Stanley*, who lived with and supported his children for eighteen years, with Michael H., whose principal claim to parenthood was biological. *Id.* at 124.

[11] *See, e.g., In re Adoption of Young*, 364 A.2d 1307 (Pa.1976)(mother estopped from terminating former husband's parental rights, based on fact he was not biological father, because husband had acted as father and been treated as father by mother); *In re Gallagher*, 539 N.W.2d 479 (Iowa 1995)(under equitable parent doctrine, former husband allowed to bring claim for custody of two-year-old child with whom he had developed parent-child relationship during marriage); *Koelle v. Zwiren*, 672 N.E.2d 868 (Ill.App.1996)(man who was the only father child had ever known awarded visitation rights, even though he was not biological parent and visitation was not specifically authorized by statute); *Quinn v. Mouw-Quinn*, 552 N.W.2d 843 (S.D.1996)(court may order visitation for mother's ex-husband, even though he was not biological parent, because he was only father child knew during her seven years of life).

[12] *See, e.g., Spells v. Spells*, 378 A.2d 879 (Pa.Super.Ct.1977)(visitation granted to stepparent who functioned as parent to child); *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982)(same); *In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wisc.), *cert. denied*, 516 U.S. 975 (1995)(biological mother's former lesbian partner could obtain visitation by proving she had parental relationship with child and visitation in child's best interest); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa.Super.Ct.1996)(same). *See also In the Matter of the Custody of C.C.R.S.*, 892 P.2d 246 (Colo.), *cert. denied*, 516 U.S. 837 (1995)(custody will be awarded to "psychological parent" over natural parent if in the child's best interest).

[13] As far back as the mid-nineteenth century, the Tennessee Supreme Court held that a stepfather had standing to sue for damages for an injury to his stepdaughter, despite the absence of any legally defined parent-child relationship. *Maguinay v. Saudek*, 37 Tenn. 146 (Tenn. 1857)(because stepfather who assumed all the responsibilities of a parent was considered *in loco parentis* to the child and could be held liable for child support, corresponding right to service and control of child should be same). Similarly, in *Eaves v. Fears*, 64 S.E. 269 (Ga.1909), the Georgia Supreme Court held that grandparents who stood *in loco parentis* to a child were entitled to the proceeds from the child's labor and concomitantly responsible for the child's care, maintenance and support. *See also Sparks v. Hinkley*, 5 P.2d 570 (Utah 1931)(because aunt stood *in loco parentis* to nephew, relationship was akin to that of parent and child and nephew was not entitled to recoup the contributions he made to aunt's support upon her death); *London Guarantee & Accident Co. v. Smith*, 64 N.W.2d 781 (Minn.1954)(granting parental immunity in negligence actions by children against stepparents because of duties and responsibilities they assume with respect to their children); *Hush v. Devilbiss Co.*, 259 N.W.2d 170 (Mich.App.1977)(applying *London Guarantee* to extend parental immunity to grandmother functioning as parent); *Vol-*
(continued...)

In sum, under a long line of state cases, the lack of a biological or legal tie eviscerates neither the rights nor the responsibilities that adhere in a parent-child relationship.[14] Consistent with that understanding, this Court's emphasis on protection for parent-child relationships has not operated to deny the realities of family life, but instead has encompassed them.

II. WASHINGTON'S NONPARENT VISITATION STATUTES ARE AN UNCONSTITUTIONAL INTERFERENCE BY THE STATE IN PARENT-CHILD RELATIONSHIPS IN VIOLATION OF THE DUE PROCESS CLAUSE

The Troxels sought and obtained visitation with Tommie Granville's children, over her objection, pursuant to RCW 26.10.160(3) and former RCW 26.09.240, both of which address the visitation rights of nonparents. Both statutes allow *any person* to seek and obtain a court order for visitation *at any time* upon a showing that visitation "may serve" the child's best interest.

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[13] (...continued)
unteer State Life Ins. Co. v. Pioneer Bank, 327 S.W.2d 59 (Tenn.App. 1959)(potential adoptive parents who raised child since shortly after birth stood *in loco parentis* to child and were therefore entitled to benefit from rule that parent has insurable interest in child's life).

[14] *See, e.g., Jensen v. Jensen*, 80 A.2d 244 (N.J.Super.1951)(man could not escape child support payments by proving he was not biological father where he held out children as his own); *People v. Sorenson*, 437 P.2d 495 (Cal.1968)(upholding defendant's conviction for failure to provide support for child to former wife, even though he was not biological parent, because he represented himself as father). *See also Wener v. Wener*, 35 A.D.2d 50 (N.Y.App.1970); *Tyler v. Tyler*, 671 S.W.2d 492 (Tenn.App.1984); *K.B. v. N.B.*, 811 S.W.2d 634 (Tex.App.1991), *cert. denied*, 504 U.S. 918 (1992).

A. The Challenged Statutes Constitute A Substantial Interference In The Parent-Child Relationship

At the outset, it is worth noting that when a court intervenes in a parent-child relationship and orders that a child have visitation with a third party, over the parent's objection, a substantial burden has been placed on family autonomy in child-rearing. The right to family autonomy in child-rearing necessarily encompasses a parent's judgments about such everyday but nonetheless critical questions as: with whom the child will maintain an ongoing and intimate family relationship; with whom the child will spend substantial amounts of time; and to whom the child will look for healthy adult role models. It is precisely these types of decisions, central to the upbringing of children, that are generally reserved to parents in the absence of an overriding state interest. *See Pierce*, 268 U.S. 510; *Yoder*, 406 U.S. 205. To transfer such decisions to a state court, whenever any third party files a visitation petition, cannot persuasively be characterized as a minor or inconsequential burden on the parent-child relationship.

One need look no further than the visitation order entered on behalf of the Troxels to aptly illustrate the point. The trial court entered a decree ordering visitation with the Troxels one weekend per month, one week during the summer, and four hours on each of the Troxels' birthdays. *In Custody of Smith v. Stillwell*, 969 P.2d 21, 23 (Wash. 1998). In addition, the trial court prohibited Ms. Granville, the mother, from talking to her children about the suicide-death of their father until she and the Troxels were able to arrive at a joint explanation. Brief of Pet. at 5. Finally, the trial court ordered Ms. Granville to notify the Troxels of the children's school and extracurricular activities. Brief In Opp. To Cert. at 2.

Thus, the trial court in this case vetoed a mother's decision about what type of relationship her children should have with third parties, substituted itself for the mother in deciding who would be included as the children's adult role models and, at the behest of third parties, ordered the mother not to help her children understand the suicide-death of their father. Clearly, the trial court, acting pursuant to the challenged statutes, substantially interfered with the parent-child relationship enjoyed by Ms. Granville and her children. Indeed, this Court has found a violation of the Due Process Clause based on a far less significant burden on parental decisionmaking. *Meyer*, 262 U.S. at 403 (statute that prohibited teaching foreign languages to students who had not completed eighth grade violates parents' constitutional right to control the education of their children).[15]

B. The "Best Interest Of The Child" Standard Is Too Low A Threshold To Permit Interference With A Parent-Child Relationship On Behalf Of A Third Party

The "best interest of the child" standard utilized in the challenged statutes is, by its nature, imprecise and broadly defined. Under Washington law, the breadth of factors to

[15] It is true that government can influence a child's role models, most notably through the provision of public education. But the state's especially strong interest in the education of children for citizenship is well-established. *Meyer*, 262 U.S. at 399; *Yoder*, 406 U.S. at 214. The state has no comparable interest in interfering with a fit parent's decisions about what adults will have a familial relationship with her child, and what forms those relationships will take. *Stanley*, 405 U.S. at 657-58 ("The State's interest in caring for Stanley's children is *de minimus* if Stanley is shown to be a fit parent"). Indeed, even in the context of education, a parent can choose alternative role models by exercising her constitutional right to remove her child from public education in favor of a private school. *Pierce*, 268 U.S. 510.

be considered in applying the test are indeterminate and "not capable of specification, each case being largely dependent upon its own facts and circumstances." *In re Welfare of Aschauer*, 611 P.2d 1245 (Wash.1980). The broad discretion which such a test invests in the court unavoidably places the state, rather than the parent, in the position of deciding how the child is best reared. Granting such powers to a court, at the expense of a fit parent, conflicts with the constitutional protections afforded to parental decision-making:

> For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. "You may do whatever you choose, so long as it is what I would choose also" does not constitute a delegation of authority.
>
> Kathleen Bean, "Grandparent Visitation: Can The Parent Refuse?", 24 U. Louisville J.Fam.L. 393, 441 (1985-86).

There is no precedent in this Court's decisions for allowing a state to interfere, on behalf of a third party, in a fit parent's decisionmaking about child-rearing on a "best interest of the child" showing. Indeed, when a fit parent is raising a child, the state's interest in that child's care is generally "*de minimus*." *Stanley*, 405 U.S. at 657-58. Here, the contrast with decisions of this Court that have *allowed* state interference with parental child-rearing is instructive. For example, the state generally may require school attendance over a parent's objection. *Meyer*, 262 U.S. at 399; *Yoder*, 406 U.S. at 214. Likewise, the state may require both children as well as adults to be vaccinated for protection from communicable diseases. *Prince*, 321 U.S. at 166-67; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). And, as discussed above, this Court held in *Prince* that state child

labor laws could be enforced against a parent who arranged for her child to sell publications in the street. Thus, state interference in the parent-child relationship has been permitted to protect children from illiteracy, disease, and the severe effects of working outside the home at an early age. The state simply has no interest of comparable weight in acting on behalf of a third party to veto a fit parent's judgment concerning with whom her children should spend time. *Stanley*, 405 U.S. at 657-58.

The "best interest of the child" standard has historically been reserved for cases involving conflict between two parents who are dissolving their relationship, or cases in which there is not a fit parent caring for the child. Thus, in Washington when two fit parents are ending their relationship and are unable to agree on child-rearing choices, the court is given broad discretion to develop and order a parenting plan. *In re Marriage of Littlefield*, 940 P.2d 1362, 1368 (Wash.1997). In that context, a court's exercise of such unfettered discretion cannot be constitutionally suspect because the conflict between the parents leaves no parental decisionmaker to whom the court can defer. Indeed, the court "compares the merit of the prospective custodians and awards custody to the better of the two." *In re Marriage of Croley*, 588 P.2d 738 (Wash.1978). A court could not constitutionally engage in such an inquiry as between a fit parent and a nonparental third party. *Stanley*, 405 U.S. 645.

Similarly, when the state is confronted with unfit parents in a dependency hearing, it cannot be constitutionally questioned that the rights of those parents are secondary, and the child's best interest is paramount. In such cases, a parent cannot or will not care for the child, and the state therefore has a compelling interest in providing care. *In re Sego*, 513 P.2d 831, 832 (Wash.1973)("when the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail").

The best interest test may also play a role in some circumstances when a minor asserts a constitutional right to act independent of parental authority. For example, in the abortion context, the state may either permit minors who so choose to make the abortion decision without parental involvement, or may instead require parental involvement or a court order before a minor has an abortion. *Bellotti v. Baird*, 443 U.S. 622. If a minor goes to court for a waiver of a parental involvement requirement, and the court finds that she is not mature enough to make the abortion decision on her own, the court must then determine whether an abortion (without parental involvement) would be in her "best interest." *Id.* at 644; *Lambert v. Wicklund*, 502 U.S. 292, __, 117 S.Ct. 1169, 1172 (1997). In such a case, application of the best interest standard may be critical to the vindication of the minor's own constitutional rights.

The Washington statutes challenged here do not, however, provide a mechanism by which the minor can engage in constitutionally protected conduct independent of the parent. Nor is the state acting *in loco parentis* in the absence of a fit parent. Nor is one fit parent pitted against another. Instead, here the state is acting *on behalf of a third party* to override the judgment of a *fit* parent about what is best for her child. Under such circumstances, application of the best interest test is an unconstitutional intrusion into the parent-child relationship.[16]

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[16] As noted by the state supreme court, the intrusiveness of the best interests standard is magnified in this case by the fact that the challenged statutes permit any person to file a visitation petition, regardless of that person's past relationship with the child. Petitioners do not quarrel with this authoritative construction of state law. Citing *United States v. Salerno*, 481 U.S. 739 (1987), however, petitioners argue that the state supreme court erred in declaring the statutes facially invalid on the basis of this expansive standing rule since, they point out, virtually all the re-

(continued...)

C. This Court's Precedents Suggest That A Nonparent Visitation Statute Might Pass Constitutional Muster If It Required A Showing That Denial Of Visitation Would Substantially Harm A Child

While Washington's nonparent visitation statutes are in our view clearly unconstitutional, we believe that a carefully crafted law which permitted third party visitation upon a showing of harm might well be constitutional. *Wisconsin v. Yoder*, 406 U.S. at 206.

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[16] (...continued)
ported cases involve grandparents or other close relatives. Even accepting the accuracy of this assertion, *arguendo*, petitioners' reliance on *Salerno* is misplaced for several reasons. First, the proposition for which *Salerno* is cited -- that a law can be declared facially unconstitutional only if "no set of circumstances exists under which [it] would be valid," *id.* at 745 -- "has never been the decisive factor in any decision of this Court, including *Salerno* itself." *City of Chicago v. Morales*, 527 U.S. __, __, 119 S.Ct. 1849, 1858 (1999)(plurality opinion). In part, that may be because *Salerno* proposes a second test in the very next sentence that more closely resembles the traditional standard of substantial overbreadth. *Salerno*, 481 U.S. at 745 (statute should not be struck down if it is only unconstitutional in "some conceivable set" of marginal circumstances). Second, whatever its application in other contexts, the more rigid *Salerno* rule has never been the test for facial invalidity in First Amendment cases. *E.g.*, *Houston v. Hill*, 482 U.S. 451 (1987). And, while the constitutional right of family autonomy is most frequently discussed in substantive due process terms, it plainly also has roots in the First Amendment right of intimate association. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Third, the challenged statutes in this case are unconstitutional even under *Salerno*'s most exacting formulation. The "best interest of the child" standard will *never* give proper deference to the sanctity of the parent-child relationship and will *always* hold those seeking visitation to a lower threshold than is constitutionally permissible. Thus, the statutes can *never* be constitutionally applied because they *always* apply a constitutionally deficient test. *See Morales*, 119 S.Ct. at 1866 (Breyer, J. concurring)(a statute that always applies an unconstitutional standard is always unconstitutional).

This case does not require the Court to delineate more precisely the constitutional tests that should be used to decide if a state law or state court decision which requires some showing of harm is sufficient. State courts, which are charged with sorting out family disputes, have been devoting considerable attention to just what those standards ought to be. For example, the issue has received significant attention in state cases addressing the circumstances under which the courts may interfere when separating parents cannot agree about the religious upbringing of a child. Because of the free exercise interests involved in those cases, state courts have eschewed the "best interests of the child" test normally applied to resolve child-rearing conflicts between separating parents, and instead have applied a substantial harm standard. Thus, most state courts have held that each parent can choose what, if any, religious training to provide for the child, without state interference, absent a showing of a "substantial threat of present or future, physical or emotional harm to the child." *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super.1990).[17] Under these cases, harm to a child cannot be simply assumed or surmised. *Felton v. Felton*, 418 N.E.2d 606, 607 (Mass.1981); *Hanson v. Hanson*, 404 N.W.2d 460, 464 (N.D.1987). Instead, a factual showing is required, and the harm must be demonstrated in detail.

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[17] *See, e.g.*, *Munoz v. Munoz*, 489 P.2d 1122 (Wash.1971); *Robertson v. Robertson*, 575 P.2d 1092 (Wash.App.1978); *Ledoux v. Ledoux*, 452 N.W.2d 1 (Neb.1990); *Khalsa v. Khalsa*, 751 P.2d 715 (N.M.App.1988); *Petition of Deierling*, 421 N.W.2d 168 (Iowa App. 1988); *Matter of Marriage of Knighton*, 723 S.W.2d 274 (Tex.App.1987); *Hanson v. Hanson*, 404 N.W.2d 460 (N.D.1987); *Kelly v. Kelly*, 524 A.2d 1330 (N.J.Super.1987); *In re Marriage of Mentry*, 190 Cal.Rptr. 843 (Cal. App.1983); *Sanborn v. Sanborn*, 465 A.2d 888 (N.H.1983); *Fisher v. Fisher*, 324 N.W.2d 582 (Mich.App.1982); *Felton v. Felton*, 418 N.E.2d 606 (Mass.1981); *Osier v. Osier*, 410 A.2d 1027 (Me.1980); *Compton v. Gilmore*, 560 P.2d 861 (Idaho 1977); *Harris v. Harris*, 343 So.2d 762 (Miss.1977).

Robertson v. Robertson, 575 P.2d 1092, 1093 (Wash.App. 1978); *Felton*, 418 N.E. 2d at 607. And, while the harm involved may be present or future injury, it typically must endanger the child's physical, mental or emotional health. *Robertson*, 575 P.2d at 1093. Some state cases also suggest that they will not entertain a request to order visitation over a parent's objection unless the third party involved has a significant relationship with the child in question. *See, e.g., Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind.App.1997).

Since Washington's statutes required no showing of harm at all, they are plainly unconstitutional. The question of whether other standards for determining harm may be constitutionally adequate should be left for a case which presents the issue squarely. It may well be that this Court will never need to say more than it already has. This Court has already made it plain that a clear showing of harm is essential. *Meyer v. Nebraska*, 262 U.S. at 403. And this Court has also recognized that "emotional attachments that derive from the intimacy of daily association" and the "deeply loving and interdependent relationship[s]" that can develop when an adult cares for a child over time do not require a biological or a marital relationship. *Smith*, 431 U.S. at 844; *Stanley*, 405 U.S. 645.[18] It is quite possible that the state courts that deal with the reality of family life day in and day out may need no more guidance than that.

[18] *See also Roberts v. United States Jaycees*, 468 U.S. at 618-20 ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life").

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Washington should be affirmed.

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In The

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JENIFER TROXEL, et vir,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Washington

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

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I. THE INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Founded in 1977, the National Association of Counsel for Children (NACC) consists of nearly 2,000 professionals from all 50 states. Most of the members are attorneys who represent children before the family and juvenile courts of the nation. NACC's Board and membership also includes judges, physicians, psychologists, social workers, law professors and other professionals concerned about children. NACC helps to train professionals who assist children within the legal system, and educates public officials about their needs. The NACC works with the American Bar Association, The American Academy of Pediatrics, The National Council of Juvenile and Family Court Judges, and others. Over the past twenty years, the NACC Amicus Committee has contributed numerous *amicus curiae* briefs to federal and state appellate courts, sharing the views of its membership with courts facing difficult decisions.

The NACC submits this *amicus* brief on behalf of the interests of children in having the law recognize and protect their significant relationships to the adults they have come to regard as members of their family. While this primarily entails protecting the fundamental rights of their parents to love, nurture and raise them free from unwarranted state interference, it may occasionally call for state action to protect children's significant relationships with others, including grandparents and other relatives, stepparents, and unrelated *de facto* parents.[1]

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*.

II. SUMMARY OF ARGUMENT

Under the Washington statute challenged here, any local judge can issue a court order requiring a mother to "confer" with her children's paternal grandparents, who have never been their custodial caregivers, about how and when to tell the children about their biological father's suicide. That judge can also require many other things of parents and their children, trivial and momentous, at the request of "any person" seeking visitation with a child and without a preliminary inquiry into the nature of the person's relationship to the child or any finding that the child will be otherwise seriously disadvantaged.

The Washington Supreme Court correctly ruled that Wash. Rev. Code 26.10.160(3) and the former 26.09.240 are unconstitutional incursions on the fundamental rights of children and their parents to family privacy and autonomy under the due process clause of the 14th Amendment.[2] By shifting the locus of decisionmaking about a child's "best interests" to state courts and away from those who have custodial responsibility for the child – usually one or both parents – this statute strikes at the heart of longstanding common law and constitutional principles that protect parental autonomy and ensure that

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Their letters of consent have been filed with this Court under separate cover.

Pursuant to Rule 37.6, *amicus* NACC states this brief was not written in whole or in part by counsel for a party, and no individual or entity, other than NACC or their members, has made a monetary contribution to the preparation or submission of this brief. The four listed attorneys all participated in its research and writing.

[2] NACC refers to these provisions hereafter singularly, as "the statute."

a child will not become "the mere creature of the State," *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). While there are compelling circumstances warranting state intervention, the statute lacks any standing requirement limiting outside application for visitation, and the criteria for parental supersession is the amorphous "best interests of the child." These overbreadth and vagueness infirmities allow courts to arrogate to themselves the right to override routine parental decisions, such as where children will spend their weekends and holidays, or challenge more private and intimate beliefs, such as what children should be told about the cause of a parent's death.

As this Court acknowledged in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), there is a "private realm of family life which the state cannot enter" that has been afforded both substantive and procedural protection against arbitrary state intrusion into the intimate relationships of parents and children alike. Absent a "powerful countervailing interest" of the state in protecting a child's welfare, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), court action on behalf of a non-parent based on an ill-defined "best interests of children" test is an impermissible burden on parents and on the liberty interests of children to a parent and a measure of family autonomy. That burden includes financial, time, and privacy sacrifices by the affected family.

The constitutional doctrines most relevant here are both substantive and procedural due process and this Court is being asked to consider the ways in which they operate within the context of state court actions initiated by private parties seeking a court order for visitation with a child over the objection of a custodial parent or

parents. The statute that authorizes these private actions is overbroad in allowing "any person" to commence an action without a preliminary inquiry into the nature, scope, or quality of the person's relationships to a child. It is also impermissibly vague, as manifest by its failure to define or set any limitations on "visitation," specify the factors that should be considered in making a best interests determination, or allocate the burden of proof for either an initial or a modification hearing. Although the state's *parens patriae* interest in protecting children against "harms" or threatened harms is compelling, it does not warrant allowing any person to invoke this interest against a child's custodial parent absent a showing that the parent is, in fact, insufficiently protecting the child against harm.

However, notwithstanding *amicus* NACC's support of judgment for the Respondent, the Washington Supreme Court decision delineating "parental rights" is overly broad in the opposite direction, and should not be adopted as written. The court below posits a superseding "parental rights" constitutional concept which would categorically bar the visitation rights of non-parents – including those who have historically performed as parents and who are regarded as such by affected children.[3]

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[3] *See also Prince v. Massachusetts, supra* at 166 (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." These rights do not necessarily reside only with biological parents. In *Prince*, for example, the "parent" was the child's aunt and legal custodian. "Nor has the [Constitution] refused to recognize those family relationships unlegitimized by a marriage ceremony." *Stanley v. Illinois, supra* at 651. Note that both parties agree that state courts may properly order

The adoption of a simplistic definition ignores the legitimate compelling state interests which can justify state intervention in parent-child relations, and completely ignores the constitutional rights of children. This theory denigrates the child's right to associate with those to whom he or she has bonded, and precludes a proper, balanced role of the state to protect legitimate child interests. Moreover, a pendulum shift from "anyone can invoke the courts to visit a child," to "no one except a parent can do so," would bar court intervention where many states properly allow it, and would be as harmful to the affected children as the statute challenged here.

A statute with better procedures – a threshold standing requirement to show that someone seeking third party visitation has a significant relationship with a child, followed by a substantive standard and allocation of the burden of proof that will honor the common law and constitutional presumption that parents act in their child's best interests – should survive constitutional review. The Washington statute does not.

Accordingly, *amicus* NACC asks this Court to walk a line down the middle between the objectionable statute and the objectionable analysis of the Washington decision. We ask this Court to uphold the judgment below, but on a narrower basis, one which recognizes the potential to cure the Washington statute's serious infirmity. NACC asks that the decision preserve necessary state action on a compelling state interest basis. NACC further asks that this Court acknowledge for the first time that

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visitation or otherwise legally protect (in some situations) children's ties to individuals who have become their *de facto* parents without state law recognition of full parental status.

any analysis of parental constitutional right must consider the counterpart constitutional right of a child. Children are included in our Constitution. The parent-child relationship involves two parties. Rights arising from that relationship are not reserved for either exclusively, but flow in both directions.

III. THE COURT BELOW HAS PROPERLY STRUCK A STATE VISITATION SCHEME THAT VIOLATES FAMILY PRIVACY – BUT ON THE BASIS OF AN OVERLY BROAD DEFINITION OF PARENTS' RIGHTS

The narrow issue before this Court is whether the critical Washington statute, as construed by that state's highest court, impermissibly burdens rights to family privacy and parental autonomy protected by the Due Process Clause of the 14th Amendment. *Amicus* NACC agrees that the legislative language objectionable to the Washington Supreme Court is overly broad. The conferral of visitation rights to non-parents may involve a serious intrusion into family autonomy and may gratuitously challenge parental authority to raise a child. As the Respondent argues, the statute here at issue would confer a charter to the state to breach family privacy and to interfere with parental rights without clear criteria or comprehensible limitation.

A. The Washington Statute is Overly Broad

The Washington statute lacks any specificity. There are no requirements for standing or any preliminary showing of who "any person" is in relation to a child. There is no allocation of the burden of proof, or any other limitation or criterion. While the statute offers any one at

any time potential court-ordered access to a child, Washington does not provide for any concomitant obligation by any claimant to support the child, to stand liable for child truancy or delinquency, or even to visit the child as the claimant requests of the court and may promise to a child. A child's parent or parents, who are subject to these and other obligations, may find themselves defending their parenting choices under a statute that simply empowers a trial judge to substitute his or her choice, without standing limitations as to applicants, or clear standards as to the basis or nature of visitation ordered. Because of their overbreadth and vagueness, the visitation statute here at issue was properly struck by the Washington Court.

B. The "Best Interests" Standard of the Washington Statute is Impermissibly Vague

Although best interests is "indisputably a substantial governmental interest" in custody disputes between two parents (*Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)), this Court has rejected its use as a basis "for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others." (*Reno v. Flores*, 507 U.S. 292, 304 (1993).) This Court's opinions indicate that the Constitution precludes the use of an amorphous "best interests" test between a legal parent and a non-parent without some preliminary finding that justifies an inquiry into the parent's childrearing decisions. For example, in *Stanley, supra* at 653 n.5, this Court eschewed a state's reliance on "best interests" as "the only relevant consideration in determining the propriety of governmental intervention in the raising of children. . . . " Because Stanley was an

unwed father who had "both sired and raised" his children, the Court found he was entitled as a matter of due process to a hearing on his parental fitness before the State could remove the children from his custody. By contrast, when an unwed biological father has failed to perform parental duties, the state is justified in denying the biological father a right to block his child's adoption by others. Thus, in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), the state was allowed to use a best interests test to "give full recognition to a family unit already in existence," a family consisting of the child's custodial mother and her husband who sought to adopt the child. In abuse and neglect cases, the state must first establish grounds for removing a child from the parents' legal custody of a parent before placing the child in foster care or for adoption based on a best interests standard (*see Santosky v. Kramer*, 455 U.S. 745 (1982)).

Where competing fundamental interests are at stake, the best interests standard is not helpful because "it provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores. . . . " *Bellotti v. Baird*, 443 U.S. 622, 655-56 (1979) (Stevens, J. concurring). A best interests test that fails to give any deference to a parent's fundamentally protected right to parental autonomy is not a narrowly tailored means for the state to implement its *parens patriae* interests, except in those specific situations where the *parens patriae* interest is genuinely compelling.

The best interests test has long been the subject of academic as well as judicial criticism for being indeterminate, providing little guidance on how to weigh the different needs of individual children, especially as they change over time; Robert H. Mnookin, Child-Custody

Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs., 226, 257 (Summer 1975). Best interests operates as "an empty vessel into which adult perceptions and prejudices are poured." Hillary Rodham, Children Under the Law, 43 Harv. Ed. Rev. 487, 513 (1973).[4]

C. The Court's Decision Prohibiting Any Alternative Statutory Scheme for Non-Parent Visitation is Overly Broad

On the other hand, the Court partly based its holding on a definition of "right to parent" which itself is overly broad. Indeed, adoption of the Court's definition of that "right to parent" portends irreparable harm to children and disruption of a myriad of state provisions that provide for visitation with more specific criteria and justifiable consequences. In fact, as the case law on point suggests, excessive interference by the state in parental prerogative through visitation orders to marginally

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[4] *See also* Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 TULANE L. REV. 1365, 1181 (1986) (The "best interests" standard is "a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge. Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself."); Gary Crippen, Stumbling Beyond the Best Interests of the Child, 75 MINN. L. REV. 427, 499 (1990); Annette R. Appell and Bruce A. Boyer, Parental Rights v. Best Interests, 2 DUKE J. GENDER LAW & POL. 63 (1995) (analysis of cultural, class, religious, ethnic, and racial biases that pervade totally discretionary use of "best interests").

involved persons is not common. But the need to allow some contact between children and non-parents who have a genuine, longstanding relationship is more common. Such persons often are grandparents, but may not always be biologically related at all.

Consider the overbreadth of the Washington court's decision. A grandparent who has effectively raised a child over many years, may be denied further contact, including the right to ask a court to consider allowing it. The objection to such absolutism goes beyond grandparent interest. Whether grandparent, uncle, or family foster care provider, the involved children may have bonded with such persons. To them, they have been removed from a person who may be the only parent they have ever known, someone they rely on for their security, who they love as only a child can love. States properly pay attention to a child's powerful psychological ties to people who may not fit the legal status of "parent" at a given moment in time, and a visitation order as against the legally defined parent may be constitutionally fashioned with proper statutory threshold qualification.[5]

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[5] Note that the Washington court's position could bar court enforcement of agreements negotiated by legal parents with third parties to allow continuing contact with a child, including post-adoption contact agreements. These compacts are becoming more prevalent. Joan H. Hollinger, Adoption Law & Practice, Chapter 13 (J.H. Hollinger, ed. 1989-99). At least 17 states have recognized the legality of agreements to permit continuing contact between a biological parent and a child after adoptive parents assume full parental status. In addition, many children who are allegedly abused are placed into foster care, bond with new caretakers often over many years, and are then returned to parents or permanently placed elsewhere. The court below's parenting rights definition would preclude visitation in these settings after court jurisdiction terminates to anyone but

Indeed, there are longstanding common law and equitable cases acknowledging a recognized parental relationship between children and legal strangers. *See esp. Chapsky v. Wood*, 26 Kan. 650 (1881), a case where a father sought to reclaim custody of a child from a maternal aunt who had cared for her since infancy after the death of his wife. In upholding a decision to leave the child with the aunt, the *Chapsky* court writes: "the affection which springs from [the natural relation between parent and child] is stronger and more potent than any which springs from any other human relation," and, from a parent's natural duty of care arises the "reciprocal right to custody." The court notes, however, that children are not chattel and the right to custody is not absolute, concluding: "it is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel." Hence, a century before the "psychological parenting" theory became the vogue, American courts were recognizing the ties that bind children to non-parents.

D. Threshold Tests Can Cure the Statutory Defects

To cure the correctly identified overbreadth and vagueness flaws in the Washington law, such a visitation statute should properly include some threshold interest to confer standing for court intervention. Such a threshold may be based on an existing or prior relationship

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the custodial parent who has been awarded the child. The child may be treated as a trophy going to a winning parent. Imposing such inflexibility on judges and state legislatures is unwarranted.

with a child, a child's prior or present relationship with an adult (the child's right), or a compelling state interest in monitoring a child's status. Mere biology, beyond parental status (*e.g.*, grandparent, uncle, sibling) is overly broad.[6] The proper standard, respecting the constitutional right to parent, the constitutional rights of the child, and possible compelling state interest limitations on both, should best follow American Law Institute standards to determine by objective standards what role an applicant individual plays in the life of the child. If a third part applicant has no such prior relationship with a child, the threshold burden is properly difficult: a showing that the child would be harmed if visitation is not allowed.[7]

There may be circumstances where a judge is needed to check custodial parent determinations in such regards, particularly where cut-offs are imposed to those with a prior relationship or some other compelling state interest is triggered. But the family benefits, including the children, from a default rule of parental authority, with something more than a "best interests" call of a court to supersede it. Where such judicial entry is without any threshold qualification, the best interests standard operating alone may lead to a judge's personal values trumping

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[6] On the other hand, as discussed below, a constitutional requirement that state ordered visitation confine itself to parents is overly narrow.

[7] An example might be a special needs child whose mental health or physical development depends upon a continuing relationship. Other examples are analogous to the well developed body of law limiting parental authority where it denies children access to medical services important to their health and safety.

the considered, bona fide judgment of the custodial parent, as argued above, or it may lead to a result based substantially on the comparative legal/financial resources available to the respective parties.

IV. THIS COURT SHOULD AFFIRM THE CHILD'S INTERESTS IN THE PARENT-CHILD RELATIONSHIP AND ALLOW FOR PROPERLY TAILORED STATUTES WHICH BALANCE THE RELATIONSHIP BASED ON COMPELLING STATE INTERESTS

A. This Court Should Affirm a Child's Fundamental Liberty Interest in a Relationship with His or Her Parent

Existing Supreme Court holdings pertaining to the rights of children have not always acknowledged two aspects distinguishing their interests. First, children are invariably the weakest of private parties outside the scope of the state. Any source of power, from individual adults to large institutions, may determine their fate without likely direct check from them (unless exercised by adult surrogates on their behalf). Given this private power impotence, the state is often the only societal mechanism available to protect their interests. Constitutional limitations on the state to so act may relegate them to untender mercies by limiting public intervention to a group that uniquely relies on its protective offices.

Second, the Court on occasion has selected an adult constitutional right, placed it exclusively on the table, and engaged in the standard constitutional line of inquiry: is this adult right "fundamental," if so, strict scrutiny applies and compelling state interest and least restrictive alternative analysis follows. The "right to parent" has been conferred such status. The problem with

such a paradigm is its exclusion of competing constitution based rights entitled to co-equal status. Where multiple rights are placed on the table for co-extensive consideration, the more balanced analysis informs resulting conclusions.

This Court has repeatedly recognized that children post-birth are entitled to constitutional protection. They are persons. *See Roe v. Wade*, 410 U.S. 113 (1973); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). And the Court well understands the bond of a parent for a child: " . . . a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' " *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18 (1981), quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1971). Is a child's "desire for and right to 'the companionship, care, custody, and management' by his or her parent" any less deserving of constitutional recognition? On what basis? Any distinction one might conjure in comparing the adult right commends more strongly acknowledgment of the child's counterpart right, as discussed below.

Such a clear holding does not mandate unworkable strictures. It merely places the interests of children on the constitutional table. They may be trumped by a competing constitutional right, including a parent's right. But such recognition balances both equitably, rather than relegating one to categorical dismissal.

In *Michael H. v. Gerald D.*, this Court noted: "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here. . . . "

(491 U.S. 110, 130 (1989).) Clear acknowledgment that children have a constitutional right to a parent is long overdue. Where that relationship is abusive and harmful to the child, a compelling state interest arises which may limit its enjoyment, but such an interest properly modifies a child's concomitant rights, it should not eliminate them.

1. The Fundamental Rights of Families Are Not Determinable Solely By Biology

This Court has recognized that families, as distinct entities, have fundamental rights, and the individuals who comprise a family have a fundamental right to associate with each other. The "intangible fibers that connect parent and child . . . [and] are woven throughout the fabric of our society. . . . are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). This Court has recognized further that the freedom to enter into and continue certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Although the Court has not marked the precise boundaries of this type of protection, it has invoked the due process and equal protection clauses of the 5th and 14th amendments to protect marital relations (*Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978)), the conception and bearing of children (*Carey v. Pop. Servs. Intern'l*, 431 U.S. 678, 684-86 (1977)), decisions about child rearing, education, and religious beliefs made by parents who are actually engaged in the task of caring for and nurturing their children (*Pierce v. Society of Sisters*, 268 U.S. 510, 534-34 (1925); *Wisconsin v.*

Yoder, 406 U.S. 205 (1972)), and extended family relationships when children were in the *de facto* long term custody of a relative other than a parent (*Moore v. East Cleveland*, 431 U.S. 494 (1977)).

Most recently, this Court decided *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), emphasizing the importance of familial relations warranting transcript provision to a mother facing a parental termination judgment. Justice Ginsburg wrote: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' *Boddie*, 401 U.S. at 376, rights sheltered by the 14th Amendment against the State's unwarranted usurpation, disregard, or disrespect." [citations omitted]

The First Amendment's right of association is also a source of constitutional protection for intimate personal relationships, family privacy, and family continuity because these relationships involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984). Relationships that grow out of shared experience, nurturing and interdependence are "an intrinsic element of personal liberty." *Id.* at 620. The constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. *Id.* at 619. The "emotional enrichment" garnered by children from their families sustains them as they grow to maturity. The State must protect children against the unwarranted loss of psychological and emotional ties to their established families. When children's sense of "family" extends beyond one or both parents and other *de facto*

parents to third parties, may on occasion be necessary for state to protect these ties.

This Court has recognized that the "intangible fibers" quoted above that connect and sustain children's familial relationships do not depend on a biological connection between a parent and a child. *Lehr v. Robertson, supra*, 463 U.S. at 261: "No one would seriously dispute" that familial interests and rights may attach to the emotional ties which grow between members of a *de facto* family. *Smith v. O.F.F.E.R.*, 431 U.S. 816, 843 (1977). While concluding that the nature of the state's contract with licensed foster parents means that foster parents have no reasonable expectation of forming a permanent family with the children placed with them for temporary care, Justice Brennan recognized the strength of the emotional ties that can form even without a biological connection:

> . . . biological relationships are not exclusive determination of the existence of a family. . . . The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children [citations omitted], as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

Id.

Indeed, the definition of family for constitutional purposes has never endorsed the view that parental rights or family are determined by biology alone – nor that "parents" is a term constitutionally limited to a

child's biological progenitors. Cousins, aunts, and grandparents living together are a family and are entitled to the same constitutional protection as an ostensibly more "traditional" family consisting of a mother, father, and their biological offspring. (*Moore v. East Cleveland*, 431 U.S. 494 (1977).) The stepparent adoptions permitted in *Quilloin* and *Lehr* over the objection of a biological father protected "a family unit already in existence" and then consisting of a biological mother and a non-biologically related stepfather.

Similarly, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) held that a state could constitutionally choose to subordinate a child's ties to her biological father in the interests of protecting the "unitary" family of the child's biological mother and the man to whom she was married when the child was born. Although the court did not reach or discuss the separate liberty interest of the child, a plurality held that California could constitutionally choose to protect the marital unit as against the claims of a child and an alleged biological father. However, that plurality did not preclude states from recognizing child's ties to people with whom they have substantial relationship short of finding parental unfitness or concrete harm.

Nearly thirty years ago, this Court held that despite possible violations of a biological father's due process rights, the state court should give "due consideration for the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for [a] period of time," *Rothstein v. Lutheran Soc. Servs. of Wisconsin*, 405 U.S. 1051 (1972).

2. Children Have Constitutionally Protected Liberty Interests, Some Of Which Are Fundamental Rights

A child's status as a minor does not negate her status as an identified individual with constitutionally protected rights. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1 (1967).[8] This Court is well-versed in the numerous decisions according protection to the due process and equal protection rights of children, many of which are considered "fundamental," even if they are not co-extensive with the rights of adults. Some states have also explicitly recognized that "children are not simply chattels belonging to their parent, but have fundamental interests of their own. . . . " *In re Jasmon O.*, 8 Cal.4th 398, 419, 33 Cal.Rptr.2d 85, 878 P.2d 1297 (1994). Such fundamental interests are of constitutional dimension. *In re Bridget R.*, 41 Cal. App.4th 1483, 1490, 41 Cal.Rptr.2d 507 (1996), *cert. denied*, 519 U.S. 1060 (1997).

Moreover, as suggested above, the right of a child to a familial relationship is more compelling than the counterpart "right to parent" of an adult. A child's interest in her family relationships represents more than the emotional and social interest which adults have in family life; it includes the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's

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[8] *See, e.g.*, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring.

Numerous decisions recognize that no parent in this country has an absolute right to the *custody* of his or her biological children, even if a fit parent. (*See, e.g., Bennett v. Jeffreys*, 40 NY2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976). A child's legal parent is presumed fit to raise, nurture, and care for his or her child; but no parent has an absolute or preemptive right to his or her child's custody without regard to the child's interests and welfare. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 170 (1944): "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children. . . . "

The doctrines of parental preference and a child's best interests are not necessarily in conflict. " 'In general, children's needs are best met by helping parents achieve their interests.' " *In re Angelia P.*, 28 Cal.3d 908, 917-18, 623 P.2d 198, 171 Cal.Rptr. 637 (1981). Yet, when parents and children's interests are in conflict, " 'the legal system should protect the child's interests. Not only is the child a helpless party but the parents should suffer the consequences of their inadequacy rather than the child.' " (*Id.*, citations omitted).

The parental side of the parent-child fundamental liberty interest is more conditional in its formulation. With parental "rights" come reciprocal duties. *Lehr, supra*, 463 U.S. at 257: " . . . the rights of the parents are a counterpart of the responsibilities they have assumed." It is perhaps most accurate to say that children have a substantive liberty interest in remaining with their parents and having their personal associations determined by their parents, subject to the parents actually serving

the child's interests regarding their protection, care, support, and nurturance. When the interests of the parent and the child diverge to the point where the child is harmed or threatened with harm, the state has an obligation as *parens patriae*, to protect the welfare of the child. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944). Under some circumstances, this requires giving legal protection to the child's ties to caregivers other than their biological parents.

B. Compelling State Interests Can Sometimes Justify Court Ordered Visitation of Children by Non-Parents

If a categorical parental liberty interest forecloses non-parent visitation, legislatures are accordingly barred from allowing it under any alternative arrangement. If the Court finds that hypothetical or actual statutes are acceptable as limitations on such a right, the categorical bar must be rejected.

1. Preliminary Inquiry and Threshold Requirements Can Provide Procedural Due Process to Allow Court Ordered Visitation

Amicus NACC does not ask this Court to draft an alternative statute to Washington's unacceptable version. As discussed above, we share Respondent's basic position that it is fatally flawed. But the Washington Court's categorical denial of any possible compelling state interest basis for parental right limitation produces a sledgehammer to swat a fly. Not only may a child's competing constitutional rights be implicated, but a host of possible interests, as discussed briefly above, may well apply.

Although the decision below does not categorically preclude the State of Washington from crafting a third

party visitation that would survive constitutional review, it misstates the constitutional guidelines within which such statutes may be drawn. This Court has never held that parental childrearing decisions are virtually unassailable in the absence of proof that they "directly and severely imperiled the child." (*Troxel v. Granville*, 137 Wash.2d 1, 969 P.2d 21, 29 (1998).) By suggesting in dicta that a non-parent may be awarded visitation only where there is proof of "harm" or "threatened harm" to the child, the court below is unclear whether it is referring to physical harm of the child by a parent or, alternatively, psychological harm to a child because of the loss of a significant relationship to a third party. Surely, the psychological harm to a child that is posed by a severance of prior ties to those with whom they have had a significant relationship should be sufficient to justify intervention pursuant to the state's *parens patriae* role.

Procedural due process ideally would here include a preliminary inquiry about the nature of the relationship between a third party and a child and the basis for that individual's claim that severing such a relationship would be detrimental to the child.[9] This is the most appropriate way to minimize the risk of impermissibly

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[9] Some states treat standing under state law as a "prudential limitation on the ability of individuals to seek redress in our courts." *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 352 (Ind. Ct. App. 1981) because states want to be confident that a person seeking relief from court has a "substantive right to enforce the claim that is being made in the litigation." *Pence v. State*, 652 N.E.2d 486, 487 (Ind. 1995). The purpose served by a threshold standing requirement is not to determine the issue of third party visitation is a justiciable one, but whether the person is proper party to request that the issue be adjudicated, *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 118 (1997).

burdening the parent-child relationship. Such a proposition transforms the issue from from the limitless "any person" of the Washington statute, to a preliminary standing requirement of "any person with a significant relationship to child." Wherever the lines may be drawn, alternative models are in existing state statutes from other states,[10] common law and equitable decisions, and the proposals of the American Law Institute (ALI)[11] for granting visitation or a share of custodial responsibility to *de facto* parents and to others, including grandparents.

Only if an individual seeking visitation can survive the preliminary inquiry by making the requisite showing of a significant relationship would the court then set a

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[10] *See, e.g.*, Ore. Rev. Stat. 109.119(1-3); *In re Marriage of Sleeper*, 982 P.2d 1126 (Or. 1999) (in the absence of a parent-like relationship between third party and child, custody or visitation rights conferred by statute are unavailable); the common law *de facto* parent and *in loco parentis* cases, or the commendable revision of Washington law as amended, *see* RCW 26.09.240.

[11] ALI Principles of the Law of Family Dissolution §§ 2.03, 2.04, 2.21 (Tent. Draft No. 3 Part I 1998) (tentatively approved at May 1998 Annual Meeting). Section 2.03(1)(b): A *de facto* parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the consent of a legal parent or as a result of a complete failure or inability of any legal parent to perform caretaking functions: (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived. Comment to ALI 2.21: "The standards reflect the societal consensus that responsibility for children ordinarily should be retained by a child's parents, while recognizing that there are some exceptional circumstances in which the child's needs are best served by continuity of care by other adults."

hearing for visitation. At that stage, the petitioner would have to sustain the burden of proving that visitation is in the best interests of the child and that parental objections are unreasonable. States are, of course, free to specify the content of such "best interests" as they choose, just as they can establish the content of "unfitness" in a termination of parental rights proceedings, *Santosky v. Kramer*, 455 U.S. 755 (1982). Alternatively, a state might require that petitioner prove that visitation is warranted in order to avoid detriment to a child. Also appropriate would be the standard suggested by Respondent in this case: petitioner would have to show that the child is at risk of harm if visitation is denied, meaning in effect, that the parental objection is not in the child's best interests.

To the extent, however, that petitioner shows at the preliminary inquiry that he or she has been a *"de facto* parent," as that term has been defined in a number of recent state decisions based on equitable principles, or in the proposed ALI Principles, a best interests standard may be appropriate so long as burden of proof is allocated to petitioner. Someone who has in fact functioned as a parent at the initial request of a legal parent and without expectation of financial gain, has been the child's residential caregiver, and is perceived by the child as a parent, whether legally acknowledged or not, invokes the constitutionally legitimate interest of the child to maintain that relationship.

But whether individuals who function as *de facto* parents receive constitutional protection or not, the States are not constitutionally barred from protecting their continued contact with children who regard them as a

mother or father.[12] The Washington Court's overly broad analysis of "parental rights," if upheld by this Court, would act as such a bar. Amicus asks this Court not to let that occur, and further notes that many state statutes, common law and equitable decisions have recognized functional, psychological, or *de facto* parental status, including some where this Court has allowed the decisions to stand by denying certiorari.[13]

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[12] *Amicus* NACC agrees with the New Hampshire court when it points to the fact that "[s]tepparents, foster parents, grandparents, and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact . . . " and children have a right to maintain "a close extra-parental relationship which has formed in the absence of a nuclear family." *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985).

[13] *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886 (Mass.1999), *cert. denied, Gebman v. Pataki*, 1999 U.S. LEXIS 7552 (Nov. 15, 1999) (holding that the trial court had equity jurisdiction to grant visitation between the child and the mother's former partner as the child's *"de facto"* parent). *See also V.C. v. M.J.B.*, 319 N.J. Super. 103, 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999) (holding that, while mother's former partner was not entitled to custody of children, she was entitled to visitation because she had performed parent-like functions as recognized by earlier N.J. cases); *Zack v. Fiebert*, 235 N.J. Super. 424, 563 A.2d 58 (1989) (when, as preliminary matter, third party can show that he or she stands *in loco parentis*, in parity with legal parent, such a third party should be treated as if he or she were a parent and best interests test may be used). *See also J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314 (Pa. Super. Ct. 1996) (holding that mother's former partner stood *in loco parentis* with a child and, therefore, had standing to seek partial custody); *Holtzman v. Knott*, 193 Wis.2d 649, 533 N.W.2d 419 (Wis. 1995), *cert. denied*, 516 U.S. 975 (1995) (holding that, while mother's former partner could not assert claim to custody or statutory claim to visitation, trial court may have equitable power to hear petition for visitation when it determines that petitioner has

The *Eldridge* test enumerates three critical due process factors. First, identify the private interest that will be affected by the official action; second, consider the risk of its erroneous deprivation through the procedures used, and the probable value of additional or substitute safeguards; and third, consider the government's interests, including any fiscal or administrative burden from an alternative procedure. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). These factors commend procedural due process protection to the cut-off of a child's relationship. The private interest is substantial, the risk of deprivation is great given the categorical bar suggested, and the government's burden is ameliorated by the threshold tests suggested above, and as implemented in extant state statutes.

2. Successful State Approaches Are Not Precluded by the Constitution

Amicus NACC suggests that one example of permissible state intervention occurs where a petitioner can prove that he or she has a parent-like relationship with the child and that "a significant triggering event" justifies state intervention in the child's relationship with a biological or adoptive parent. Wisconsin, for example, follows the approach suggested here. Their courts may invoke equitable principles to award visitation (but not custody) to an individual who demonstrates the existence of a "parent-like relationship" with a child by proving: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the

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parent-like relationship with child, as originally encouraged and fostered by custodial mother).

petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing to the child's support (emotional or financial) without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. *See Holtzman v. Knott*, 193 Wis.2d 649, 533 N.W.2d 419, 435-436 (Wis. 1995), *cert. denied, Knott v. Holtzman*, 516 U.S. 975 (1995).

This kind of functional test for standing to commence an action for visitation pays attention to the context in which the petitioner and the child developed the actual ties the petitioner claims should be continued or resumed. Its limited application and petitioner burdens avoid the pitfalls of the simplistic "best interests" test of the Washington statute without the simplistic counterstroke suggested by the Washington court below. In Wisconsin, as well as in other jurisdictions that have followed the similar approach of the ALI Principles, including Massachusetts and New Jersey, a best interests analysis is permitted only after the four elements listed above are demonstrated.[14] In addition, although a few

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[14] *See, e.g., E.N.O. v. L.M.M, supra*; *Youmans v. Ramos*, 429 Mass. 774, 711 N.E.2d 165 (1999) (aunt who served as niece's caregiver for years awarded visitation over father's objection). *See also In re Marriage of Gayden*, 229 Cal. App.3d 1510, 1521-22 (1991): As strong as the rights of [biological] parents must be, there may be instances in which a child would be significantly harmed by completely terminating his or her relationship with a person who has (1) lived with the child for a substantial portion of the child's life; (2) been regularly involved in providing day-

states have statutes that allow stepparents to seek visitation with a stepchild over the objection of a legal parent, others have invoked equitable principles or the doctrine of *in loco parentis* to permit visitation or custody claims by stepparents, when, for example a custodial parent dies and a noncustodial parent seeks sole custody of a child.[15]

CONCLUSION

Millions of children today, lacking traditional family stability, have ties to step and adoptive parents, to foster care families who function as parents, and to siblings (who may be the only stable human contacts for some). They may also have ties to a succession of other adults who provide emotional or financial support for them, some for many years, and for which children often feel gratitude and loyalty. The states are experimenting with a variety of ways to confer some status to these adults based on what they do for children, a contribution deserving a measure of respect from us all. The Washington statute fails because, as applied to Respondent and other custodial parents, it is too broad and too vague. It empowers the state to resolve on a discretionary and potentially capricious basis complex and intimate matters concerning the well being of children without articulating

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to-day care, nurturance and guidance for the child appropriate to the child's stage of development; and, (3) been permitted by a legal biologic parent to assume a parental role even though not married to the legal parent and not an adoptive or biological relative. The needs of the child, which are the most important consideration, may sometimes require that a visitation award be made to such a "*de facto* parent." This could apply to stepparent or to unmarried partner of legal parent.

[15] *See, e.g., Meldrum v. Novotny*, 599 N.W.2d 651 (S.D. 1999); Cal. Fam. Code § 3101.

a state interest substantial enough to justify the infringement on substantive rights protected under the Due Process Clause of the 14th Amendment. The harms and extraordinary emotional and financial costs attendant upon the protracted litigation and ongoing judicial monitoring that this statute permits are evident from the details of Respondent's case as described more fully in her brief.

Nonetheless, the Constitution does not preclude, and indeed, authorizes the states to legislate in matters affecting personal and family relationships within constitutionally prescribed outer boundaries. A more carefully crafted third party visitation statute should survive constitutional scrutiny. A procedural due process analysis through the oft-worn lens of the *Matthews v. Eldridge* factors discussed above suggests two minimal safeguards: first, a threshold standing requirement that petitioners show that they have a significant relationship to a child and that severing this relationship would be detrimental to the child; and second, that those who meet this threshold test sustain some evidentiary burden to overcome the presumption that parents act in their child's best interests.

The Washington Court's proposition that a recognized liberty interest "to parent" is categorically not subject to state abridgement to compel visitation is as flawed in one direction as the state's visitation statute is flawed in the other. *Amicus* NACC asks that this Court steer a middle course and recognize the interests of children in

their significant relationships to the adults they have come to regard as members of their family.

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IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

—v.—

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND AND GAY AND LESBIAN ADVOCATES AND DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Do Washington Revised Code 26.10.160(3) and the former RCW 26.09.240, granting third parties, including grandparents, the right to petition for visitation rights with a minor child if the visitation is "in the best interests of the child," impermissibly interfere with a parent's fundamental interest in the "care, custody and companionship of a child" as defined by the liberty and privacy provision of the United States Constitution?

2. Did the Supreme Court of Washington err in *Custody of Smith*, 137 Wn. 2d 1, 969 P.2d 21 (1998) in holding that Washington Revised Code 26.10.160(3) and the former RCW 26.09.240 are unconstitutional based upon the liberty interest of the Fourteenth Amendment and the fundamental right to privacy inherent in the United States constitution, when it used the flawed premise that a parent's fundamental right to autonomy in child rearing decisions is unassailable and that the state's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness?

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INTRODUCTION[1]

Petitioners contest a decision of the Washington Supreme Court, *Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998), that declared unconstitutional a statute that allows "any person" at "any time" to petition for visitation with a child and goes on to provide for court-ordered visitation if it serves the child's best interests. Wash. Rev. Code § 26.10.160(3). Thus, contrary to Petitioners' presentation throughout their brief, the statute before the Court is not a "grandparent visitation statute" or a statute that in any other way limits who may petition for visitation. Petitioners could and did proceed to a merits adjudication of their request for visitation simply because "any person" could do so, not because they established a particular type or depth of relationship with the children at issue, or any other relevant fact. As in every case in which it applies, Wash. Rev. Code § 26.10.160(3) opened the courthouse door here upon too lax a standard, impermissibly infringing upon a parent's right to autonomy in the care, custody and upbringing of her children. *Amici* therefore urge this Court to declare the statute unconstitutional on its face.

INTERESTS OF THE *AMICI CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and their families. Lambda advocates on behalf of parents, others involved in parenting, grandparents and young people, many

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for either party, and no one other than *amici* and their counsel has made any monetary contribution to its preparation.

of whom suffer discrimination based on their own or a family member's sexual orientation. Lambda works to ensure that children raised by lesbian and gay adults benefit from the same respect and protection for their primary relationships as do other children, including by having their family relationships or other significant relationships with adults recognized and safeguarded. Lambda also works to ensure that lesbian and gay parents are not subjected to unwarranted intrusion into their families and parenting decisions by third parties or state actors who presume to know what is best for their children. In these capacities, Lambda at various times shares the interests of adults who seek to preserve close ties to children, of children who depend on such ties and are injured by their arbitrary loss, and of legal parents who seek protection against unwarranted invasion of their family sphere.

Gay & Lesbian Advocates & Defenders ("GLAD") is a New England-wide legal rights organization which seeks equal justice under law for lesbians, gay men, bisexuals and people with HIV and AIDS. Many of GLAD's cases seek to attain legal recognition and respect for the families of such individuals and for their children. GLAD's interests fall on both sides of this case. On the one hand, GLAD seeks to protect families of intent and function who do not have access to the traditional measures marking a family. On the other hand, GLAD attempts to ensure the integrity of lesbian and gay-headed families from the intrusion of others who may disapprove of same-sex couples and parents raising children. Thus, GLAD shares the interests of some of those adults without a legal relationship to children as well as the interests of legal biological and adoptive parents.

STATUTE INVOLVED

Petitioners now rely upon only one of the two statutes challenged in their Questions Presented, Wash. Rev. Code § 26.10.160(3), which the Washington Supreme Court declared unconstitutional and which provides:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

SUMMARY OF THE ARGUMENT

Neither the decision of the Washington Supreme Court invalidating the state's nonparent visitation statute nor the statute itself squares with substantive due process requirements. One makes parental autonomy virtually inviolate; the other — by inviting visitation petitions from "any person" at "any time" — impermissibly allows its infringement at will. The Constitution charts a middle course. Several common threads of the Court's due process jurisprudence in the arena of parenting and family relations lead to affirmance of the judgment below, on different and narrower grounds, without reliance upon a strict scrutiny standard or requiring a showing of significant harm to a child before nonparent visitation may be ordered.

The Court has been justifiably hesitant to intervene in the complex realm of domestic relations law and to interfere with states' efforts to address the needs of modern families. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 770-73 (1982) (Rehnquist, J., dissenting). Experience has taught that

children may be raised well (or poorly) in any number of family forms, including by biological, adoptive and other legally recognized parents, by those who are married or unmarried, and by extended family members, single parents and lesbian and gay adults. Children also may benefit from significant relationships with adults, in addition to their legal parents, who are important to their physical or emotional health and development. It is, as ever, the quality and security of the relationship between individual children and adults rather than blood ties or labels that, among many other factors, determine a child's well-being.

In light of these realities, the states continue to need room to craft legal responses to changing family forms without premature or unmeasured federal intervention. As family structures evolve, there are diverging opinions as to who should have a legally protected role in a child's life. Some states are expanding who may claim parental rights through adoption statutes, equity and common law, and virtually every state has grappled with the need to address significant relationships between children and nonparent adults, including grandparents and others. Affirmance of the Washington Supreme Court's analysis would cut short much of the states' efforts to craft balanced standards.

This Court also has recognized that family cases are in many ways *sui generis*; constitutional standards in this area are calibrated closely to the infringement at issue, and competing individual interests may receive different weight in particular settings. The Court has wisely recoiled from a categorical approach to guarding parental liberty interests because the interests of children and others are also at stake, and because there is a continuum of possible government intrusions on parental liberty that touch more or less closely on the core of that right. Instead, the Court has used a nuanced approach that balances competing variables.

All the while, the Court has continued to value highly parental and familial autonomy and to assure that they cannot be lightly cast aside. As American families enter the next millennium, their members have no less need of protection from clear violations of their constitutional liberty interests. These interests protect the many children and families living outside the "nuclear family" model, like respondent and her children, who are equally important to our nation's family fabric. Parental autonomy does not abate upon the death or disappearance of one parent, nor is it reserved to married parents. This Court should reinforce the vital, autonomous nature of parental decisions affecting child custody and care and not readily permit states to substitute their will for that of parents, especially where liberty interests would be greatly burdened.[2] But it remains primarily the responsibility of states to set standards that adequately guard these constitutional interests in given circumstances.

These themes and the Court's case law direct the resolution of this case. Though petitioners properly object to the state court's reasoning and advance an appropriately more nuanced approach to due process analysis, they fail to appreciate the intrusiveness of visitation petitions and orders or to address the infirmity of the Washington statute. While subjecting a parent to court proceedings and the entry of an order for visitation with her child by a nonparent are not infringements on the parent's liberty interest nearly as substantial as termination of parental rights, or even the

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[2] The Court also has strongly protected the rights of parents under the Equal Protection Clause. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429 (1984) (states may not give effect to private biases in determining parental rights); *Caban v. Mohammed*, 441 U.S. 380 (1979) (unconstitutional to permit unwed mothers but not fathers to block adoption of child by withholding consent).

granting of custody rights to another,[3] neither can these be categorized as the minimal intrusions petitioners claim. At that extreme might be petitioners' example of parental challenges to books chosen by public schools. *Brief of Petitioners* ("Pet. Br.") at 28-30. But visitation proceedings and orders, demanding that a parent facilitate ongoing contact with a nonparent against her will, fall in the mid-range of infringements of the parental autonomy interest.

Court *proceedings* for visitation — or, as here, for more or different visitation than that which the legal parent freely allowed — require a parent, if she can, to marshal resources in defense of her family and cause worry and doubt as to whether the court will override her decisions about meeting her child's needs. Once a petition is initiated, a parent confronts the significant emotional and financial cost to her and her family of a court battle. She may bargain away her rights simply to avoid these harms or the stress of life

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[3] Visitation, or continuing contact with a child, is distinct from the broader array of rights that flows from having legal custody of a child. An order of custody, which is not permitted under the challenged statute and is not sought here, would require a stronger showing to satisfy constitutional requirements. *See, e.g., Buness v. Gillen*, 781 P.2d 985 (Alaska 1989) (because man acted as father figure and primary caregiver for ten years, he had standing to seek custody which could be awarded on showing of unfitness or if welfare of child requires it). For a typical description of the rights attached to custody, *see Michael H. v. Gerald D.*, 491 U.S. 110, 118-19 (1989) (plurality opinion) (*quoting* 4 *Cal. Fam. L.* § 60.02[1][b] (C. Markey ed., 1987)) ("custody ... [is] a status which 'embrace[s] the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.'") (footnotes omitted).

under a court order.

Visitation *orders* inject not only an uninvited person but a continuing obligation into a parent's schedule and a family's routine, requiring the parent to accommodate his plans for a child to particular times and places imposed by a court, and diminishing parental freedom to direct a child's upbringing. Such an obligation may interfere with a parent's normal decisions about things like enrolling her child in activities that occur at the scheduled time, such as sports or religious instruction, or from relocating to find a better school. It certainly constrains the spontaneous parent-child interactions and shared activities that nurture a loving parent-child bond. And, by supplanting a legal parent's judgment in favor of a court's continuing jurisdiction, visitation orders undercut parental authority.

The Constitution thus requires a more protective threshold standard than the open-ended invitation of the Washington statute for "any person" to petition at "any time." To prevent trampling upon a parent's liberty interest, a state must devise an entry-level test that accounts for parental liberty and assures there are adequate reasons for the intrusion of a court proceeding. One way this may be accomplished would be to require petitioners to demonstrate (1) the curtailment of a significant relationship with the children of a quality and depth that sets petitioners apart from the many people, even blood relatives, with whom children have positive, loving relationships, coupled with (2) a showing of prior parental knowledge and fostering of the relationship that allowed it to grow in importance to a child.

Requiring an unusually significant relationship to exist before a party can invoke the court's power to consider a visitation order against the parent's will establishes a reason for the state's interest, which the Washington statute lacks.

Such a relationship reasonably indicates that there may be an unwarranted detriment to the child from discontinuing contact. Requiring a further demonstration of parental fostering of the relationship gives weight to parental autonomy, by looking to the parent's role in causing the relationship to deepen and assuring that the petitioner is not a stranger or one whom the parent had sought to keep from his child. While other approaches could and do meet constitutional minimums, these requirements exemplify a threshold test reasonably calibrated to the burden on parental autonomy of a court proceeding to consider the imposition of a visitation order.

Once such a threshold or standing hurdle is cleared, a conventional "best interests of the child" standard would suffice to decide whether to order visitation, because, among other factors, it would include consideration of the parents' reasons for curtailing contact with the petitioning adult, any anticipated effects upon the parent-child relationship of court-ordered visitation, and the benefits to the child of maintaining the relationship with the petitioner, as well as the emotional or other detriment to the child from its possible end. The state court's requirement of "severe psychological harm," *Custody of Smith*, 137 Wash. 2d 1, 20, 969 P.2d 21, 30 (1998), however, exceeds what is constitutionally required to justify the imposition on parental liberty of visitation orders.

ARGUMENT

I. THE COURT USES A CALIBRATED APPROACH TO ASSESSING WHETHER THE DUE PROCESS CLAUSE PERMITS IMPOSITIONS ON A PARENT'S LIBERTY INTERESTS; COURT-ORDERED VISITATION WITH A NONPARENT DOES NOT WORK A DEPRIVATION THAT TRIGGERS STRICT SCRUTINY.

That legal parents[4] have a liberty interest in the care,

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[4] In this brief, the term "legal parent" includes all persons recognized as parents by state law. A legal parent who is involved with his children generally would have a right to visitation and standing to claim fuller parental rights, including custody, greater than a nonparent ordinarily could obtain. The liberty interest in parental autonomy is not limited to biological and adoptive parents, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (aunt and legal guardian enjoyed parental autonomy rights), nor do such ties guarantee full due process protections; the Constitution is concerned with protecting *de facto* parent-child relationships, not attaching rights to labels. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Caban*, 441 U.S. at 397 (Stewart, J., concurring); *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (citing same). *See also Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (recognizing family autonomy interest protects grandparent raising grandchildren in home).

States have based parental standing on biological or adoptive ties and also upon the actual relationship between an adult and child, looking to statutes, common law, equitable principles and parental intent. *See generally* American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, at §§ 2.03, 2.04, 2.21 (1999). Thus, for example, while "nature itself" may not provide for "dual fatherhood," *Michael H.*, 491 U.S. at 118, numerous states have done so by permitting more than one man or woman to be recognized as a child's legal parents, see, e.g., *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993), and children have benefitted as a result. American

custody and rearing of their children that merits both procedural protection and substantive recognition under the Due Process Clause of the Fourteenth Amendment has long been established. But the interests of others, especially children, also figure into the constitutional calculus and preclude any uniform description either of the state interest necessary to invade parental autonomy or of the procedures required to protect it. Instead, the Court must consider "closely and contextually" the intrusion at issue, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), and balance the state and other interests supporting intrusion against that particular infringement. Because there is no "equipoise" of interests between a legal parent and a nonparent, as there is between two legal parents, *Rivera v. Minnich*, 483 U.S. 574, 581 (1987), however, the state must employ a test that gives sufficient weight to parental liberty. The challenged Washington statute leaves parents virtually defenseless against the serious infringements of those seeking nonparent visitation. But the state supreme court decision goes overboard, demanding the highest protection for parental liberties with little regard for the extent of their infringement or other interests at stake. The Constitution requires a middle

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Psychological Association, *Lesbian and Gay Parenting; A Resource for Psychologists* at 8 (1995) ("Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.") And, where petitioner planned with a partner to bring children into the world and to share responsibility for them and then followed through, she has been recognized as a *de facto* parent. *See, e.g., E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886 (1999), *cert. denied*, No. 99-531, 68 U.S.L.W. 3323 (U.S. Nov. 15, 1999). While a person recognized as a legal parent would have a relationship allowing a claim for visitation to proceed, petitioners need not be legal parents before a state may act to protect their bonds with a child through visitation. *See, e.g., Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989) (stepparent entitled to visitation in best interests of child).

ground that affords sufficient protection for parental autonomy without foreclosing measured state action to preserve relationships important to children.

The Court has described the interest in family autonomy and privacy and the liberty interest of legal parents in the care, custody and rearing of their children in broad terms, and as "fundamental," "deeply rooted" or "'of basic importance'," *M.L.B.*, 519 U.S. at 116 (*quoting Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)); *Santosky*, 455 U.S. at 753; *Moore*, 431 U.S. at 503 (plurality opinion), but has made plain that the constitutional stakes vary with the extent and nature of the infringement at issue, and the interests of children and involved others. *See generally* Pet. Br. at 22-26; *Michael H.*, 491 U.S. at 128-30; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

Thus, the Court looks first at the extent of the government's interference with the exercise of fundamental rights bearing upon "the decision to marry . . . procreation, childbirth, child rearing, and family relationships." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). The Court has been careful, for example, to distinguish incursions which "interfere directly and substantially with the right," *id.* at 387, from lesser, more indirect invasions. *Id.* Here, the right to parental autonomy in the care, custody and upbringing of children necessarily encompasses a range of decisions and, from the perspective of the state, a range of possible infringements. Meaningful constitutional scrutiny should apply, calibrated to the seriousness of the infringement, across this full range — rather than an approach of either strict scrutiny or highly deferential rational basis review. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (statute compelling parents to send children to public schools "unreasonably interferes" with parental liberty). A more sensitive, balancing standard best protects parental autonomy

without unduly restricting government action on behalf of children or in furtherance of other important interests.

The Court likewise has recognized that there is a continuum of governmental infringements on parental autonomy that affect procedural protections that must be afforded, distinguishing, for example, the unique deprivation of terminating parental rights from infringements such as "loss of custody, which does not sever the parent-child bond," *M.L.B.*, 519 U.S. at 121, or from divorce, paternity or other matters. *Id.* at 127-28 (citations omitted). *See also Rivera*, 483 U.S. at 579 (distinguishing paternity from termination of rights proceedings). In measuring whether procedural standards are adequate to protect parental liberty, the Court also has considered a child's interest in the stability of her bonds with active caregivers. The Constitution does not, for example, require the states to afford rigorous protection to genetic parental links where the parent has not sought or developed a meaningful connection to a child. *See, e.g., Lehr*, 463 U.S. at 262 (rights of putative father with no actual relationship to child given adequate protection by availability of putative father registry; notice of adoption proceedings not required). Parents who do not participate in childrearing or in creating an actual parent-child bond cannot claim "substantial protection under the due process clause" for the inchoate parent-child relationship. *Id.* at 261; *Quilloin*, 434 U.S. at 253, 254-55 ("best interests of the child" standard in adoption proceeding, rather than right to veto adoption, sufficiently protected liberty interest of biological father who never petitioned to legitimate child, had visited sporadically, provided only irregular support and "had never been a de facto member of the child's family unit").

In contrast to these precedents, the Washington Supreme Court adopts an absolute requirement of substantial or even "severe" harm in order to infringe parental autonomy

to any degree, characterizing all infringements of parental liberty as so inherently grave as to trigger strict scrutiny. *Custody of Smith*, 137 Wash. 2d at 14-21, 969 P.2d at 27-31. This clearly has not been traditionally required. For example, persons acting *in loco parentis* may claim continued contact with a child for whom they have cared, and may also be entitled to seek custody, without having to show that severe harm awaits the child if the relationship is discontinued, *see, e.g., Gribble v. Gribble*, 583 P.2d 64, 66-7 (Utah 1978) (visitation petitioner acting *in loco parentis* to child entitled to hearing based on relationship with child; legal parent cannot unilaterally end relationship); *V.C. v. M.J.B.*, 319 N.J. Super. 103, 114, 725 A.2d 13, 20 (1999) (lesbian partner who "stands in the shoes of a parent" entitled to visitation and to seek custody), and men mistaken or misled about their biological connection to a child they have assisted in raising have nevertheless been afforded the right to petition for visitation, *see, e.g., Koelle v. Zwiren*, 284 Ill. App. 3d 778, 672 N.E.2d 868 (1996). On the other hand, the Washington legislature imposes a standard according virtually no respect to parental autonomy, allowing "any person" to petition for visitation at "any time" and permitting courts to allow such visitation when, in a judge's discretion, it serves the best interests of a child. Wash. Rev. Code § 26.10.160(3). The Constitution requires the states to chart a course between these two extremes, one that allows the states latitude to balance the valid and competing interests at stake without discounting parental liberty.

II. THE WASHINGTON STATUTE ERECTS NO BARRIER TO INVASIONS OF PARENTAL AUTONOMY AND IS UNCONSTITUTIONAL; A THRESHOLD SHOWING OF A SIGNIFICANT RELATIONSHIP WITH A CHILD THAT WAS FOSTERED BY A LEGAL PARENT JUSTIFIES VISITATION PROCEEDINGS AND ALLOWS A VISITATION ORDER IN A CHILD'S BEST INTERESTS.

A. The Washington Statute Provides No Threshold Protection For Parental Autonomy And Is Therefore Unconstitutional In All Of Its Applications.

State standards for nonparent visitation must address due process concerns that arise both at the courthouse door and at final judgment. States must take into account the very real intrusion on parental autonomy of being forced into court to defend against a nonparent visitation petition and rendered vulnerable to state supervision of one's parental decisions. This is a debilitating invasion of family security and resources for which a state must require a sufficient threshold showing, one that balances appropriately the states' significant interest in preserving key relationships for children with considerations of parental autonomy. While the showing required to bring a petition may be less than that necessary to obtain an order of visitation, allowing claims to go forward at all is still a weighty intrusion for which the standard of allowing "any person" at "any time" to petition is constitutionally deficient in all cases. Such a low threshold does not demand a sufficient reason, or any reason, before allowing a nonparent to infringe upon parental autonomy and

force parents into court.[5] The states must craft tests that shield parents from the claims of mere acquaintances and most blood relations, screening out persons with no unique relationship meriting the state's interest. Under Washington's standard, petitioners did not have to show any prior relationship with respondent's children, let alone one meriting the state's interest, to proceed to a full hearing and judgment.[6]

Allowing petitions by anyone, at any time, is no standard at all. For the parental autonomy right to have meaning, it cannot allow states to subject legal parents so easily to court action threatening to override decisions about how and with whom their children spend their time. The prospect of protracted litigation alone is an intrusion. Many a parent rationally would trade away his rightful autonomy in favor of settling the dispute rather than subjecting his family to the financial and emotional strain of litigation and risking an inflexible and invasive court order. Washington must require some demonstration of a countervailing interest that merits its concern and permits this imposition. Indeed, the Court has greatly restricted the process due even a biological

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[5] A state's usual protections against frivolous petitions would be of little use against so low a threshold. *Cf. Boddie*, 401 U.S. at 381-82 (protections against frivolous petitions offer sufficient protection of state's interests and do not justify depriving individuals of access to court to advance right of divorce).

[6] Reported cases well illustrate that the intrusion of court-ordered visitation is very real, and that proceedings for such orders tend to stir up existing hornet's nests of animosity. *See, e.g., Herndon v. Tuhey*, 857 S.W.2d 203, 204 (Mo. 1993) (*en banc*) ("A neutral observer might describe [the child's] parents and grandparents as resolute, strong-willed, tenacious and persevering. A different observer, equally neutral, might describe the same characteristics as obstinate, inflexible, unyielding, and even stubborn or hardheaded. . . . [T]he law is very inadequate when it comes to solving the personal problems of an embattled family.").

father who cannot demonstrate a meaningful relationship with his child, drawing a distinction between "developed" and "potential" parent-child relationships. *Lehr*, 463 U.S. at 261. A biological father with no actual "custodial, personal, or financial relationship" to his child enjoys no constitutional guarantee that a state must "listen to his opinion of where the child's best interests lie" simply because of his genetic connection to his offspring. *Id.* at 262. A *nonparent* with no measurable bond to a child certainly could not claim any greater protection and the state would have no discernible interest in allowing her claim. Likewise, the child's interests in such a case, particularly absent substantial harm, are those identified in *Lehr*, to have protection and "full recognition [of] a family unit already in existence." *Id.* at 263 n.19. Because the statute imposes on parental autonomy without sufficient reason, it must be struck down under any formulation of the standard for facial challenges.[7] Pet. Br. at 19.

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[7] The Brief of Grandparent Caregiver Law Center of the Brookdale Center on Aging as *Amicus Curiae* in Support of Petitioners at p. 5 n.5 takes the position that "[i]n a court's initial application of a best interests analysis, the person being deprived of visitation must necessarily show some unsatisfactory condition related to the child; *i.e.*, some harm, such as the loss of a substantial beneficial relationship, is required in order to overcome the burdensome weight that a court proceeding (and an award of visitation) would place on the parents and the children." There is a best interests standard in the Washington statute's second sentence, but none is found in the "standing" requirement of its first sentence. The Washington Supreme Court rejected any judicial gloss upon the plain language of the statute's standing threshold. *Custody of Smith*, 137 Wash.2d at 11, 12, 969 P.2d at 26 ("[T]he plain language of RCW 26.10.160(3) allows 'any person' to petition for visitation 'at any time'. . . . We decline to construe the language of RCW 26.10.160(3) because we find that the language of the statute is unambiguous"). The Court, of course, is bound by the Washington Supreme Court's construction of its statute, *New York v. Ferber*, 458 U.S. 747, 767 (1982).

This is not to say that the Constitution excludes visitation by anyone in particular or requires categorical restrictions on who may file such petitions. To the contrary, a state may wisely permit a wide range of persons to petition for visitation, and there is a logic in doing so. But the state must use a threshold standard that at least ensures individual petitioners have sufficient cause to invoke the state's intrusive powers. This obviously could *include* pleading severe harm to a child — a standard that generally allows states to assume custody and place children with strangers — but the Washington Supreme Court errs in holding this factor constitutionally mandated for all nonparent visitation. Due process is afforded by requiring, for example, a showing of a threat to a child's unusually significant relationship, if it is one that the parent had previously exercised her autonomy to foster, and many states have premised visitation upon such a showing. *See* Section II-B, *infra*.

Tellingly, petitioners do not defend the statute's "any person" at "any time" standard. Pet. Br. at 10 ("Legislation framed in this manner was not intended to authorize visitation suits by total strangers.").[8] Indeed, petitioners frame this case

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[8] While petitioners discount the possibility that courts will allow persons with scant ties to a child to press their claims, Pet. Br. at 10, *amici* can well imagine a judge with different ideas about how a child should be raised ordering contact with a child on a nominal showing of best interests, particularly where a family's form is unfamiliar. *Amici* have fought courts that have appointed an organization as guardian for the children of a lesbian mother *based upon* its long record of opposing recognition of lesbian and gay families, *In re C.M.A.*, 306 Ill. App. 3d 1061, 715 N.E.2d 674 (1999) (rejecting appointment of Family Research Council, motivated by trial judge's personal bias against lesbians, to represent interests of child of lesbian mother in second-parent adoption proceedings) and appointed virtual strangers rather than long-term lesbian partners as guardians over the person of disabled adults, *In re Guardianship of Sharon Kowalski*, 478 N.W.2d 790 (Minn. Ct. App.

as one about a grandparent visitation statute, *e.g.*, Pet Br. at 8-15, as if Washington had required them at least to establish that they were grandparents before bringing such a petition. But the statute did not even do that much. The challenged statute does not actually impose a threshold showing on any petitioner, *Custody of Smith*, 137 Wash. 2d at 11, 12, 969 P.2d at 26, and petitioners here cannot succeed by asserting they would prevail under elevated standards that Washington does not mandate.[9]

Because the Washington statute contains no threshold protection for parental autonomy interests, it is unconstitutional in all its applications and should be struck down.

B. A Threshold Standard Is Sufficient If It Requires Both An Unusually Significant Relationship And Proper Deference To Parental Autonomy.

Most states do erect hurdles that must be cleared, even by grandparents, before a child's best interests become the court's focus in a nonparent visitation proceeding. *See generally* Stephen Elmo Averett, *Grandparent Visitation Right Statutes*, 13 B.Y.U. J. Pub. L. 355 (1999). If parental autonomy is guarded by a properly constructed threshold standard, the vast majority of relatives and acquaintances —

1991), *rev. denied*, Feb. 10, 1992 (reversing denial of petition by lesbian to be guardian for disabled long-time partner, for whom she had provided rehabilitative care; petition that was supported by 16 medical witnesses had been denied in favor of person who did not petition and had rarely seen Kowalski).

[9] If the petitioners do meet a higher threshold, nothing stops them from re-petitioning under a revised statute, should this Court affirm the current statute's unconstitutionality and the legislature act to amend it.

let alone strangers on the street — will have no grounds to subject parents to court scrutiny of their childrearing decisions, as even loving grandparents, aunts or former boyfriends will not generally qualify to seek court-ordered visitation. What the state must strive for is a proper balance of the competing interests at stake that does not unreasonably jeopardize the parent's liberty in light of the intrusion at issue.

Many standards may be possible and the states should have room to craft options. But *amici* discern a logical two-part threshold from the Court's prior precedents that, in the mine run of cases, would erect a sufficient bulwark against the injury of invasive visitation proceedings. The first requirement is the existence of a significant relationship of caregiving or other fundamental importance between the nonparent and child of a quality and depth that sets it apart from the many other loving relationships that a lucky child enjoys. These are the few relationships that warrant the concern of the states. *See, e.g., V.C.*, 319 N.J. Super. at 112-13, 725 A.2d at 13, 18-19 (recognizing state interest in protecting child's relationship with biological mother's lesbian partner, who acted as psychological parent). This initial requirement, keyed to the nature and depth of the actual relationship, is consistent with the Court's focus on demonstrated bonds rather than ties assumed from blood. *Lehr*, 463 U.S. at 261-62. It establishes a reason for the state even to consider, in the *child's* behalf, the initial intrusion upon parental autonomy of court proceedings: the state's interest would be to prevent an emotional or other detriment to the child.

While no single element is dispositive, key indicators of a significant relationship would include the regular performance of nurturing and parenting functions such as feeding, clothing, guiding the children's development and activities, or financially supporting the children over a

significant length of time. For younger children, unable to articulate the importance of their attachment to adults, the regular performance of intimate caregiving functions over time, at the parent's behest, is perhaps most telling. *See, e.g., J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314 (1996) (parties "by their conduct" created bond between biological mother's child and lesbian partner that provided standing to seek partial custody); *A.C. v. C.B.*, 113 N.M. 581, 586, 829 P.2d 660, 665 (1992), *cert. denied*, 113 N.M. 449, 827 P.2d 837 (1992) (woman who raised and cared for child with biological mother until age seven has colorable claim to visitation or shared custody). Evidence of an extraordinary emotional bond, beyond general demonstrations of love and support, on which the children have come to depend, also would suffice, particularly for older children. The fact that children have lived with a petitioner for a meaningful period of time and formed with them part of an extended family household also would be relevant. *Moore*, 431 U.S. at 505. Blood relatives, just as unrelated persons, who have played an exceptionally important role in children's lives should cross this threshold. *Id.* Other petitioners also could be constitutionally provided relief, and blood ties or shared residency alone should not relieve petitioners of affirmatively demonstrating an unusually significant relationship. *Quilloin*, 434 U.S. at 254-55.

The existence of a significant relationship is one means to establish a state's interest,[10] but should not alone

[10] Some state statutes permit courts to consider ordering nonparent visitation only upon a "disruption" in the family — typically divorce, death of one parent or an ongoing custody dispute. *See generally* Averett, 13 B.Y.U. J. Pub. L. at 357-61 Like the death of petitioner's son in this case, however, these events do not themselves dissipate parental autonomy. *See,* Section II-C, *infra.* Insofar as unusually significant relationships between nonparents and children are disrupted by such

justify a state veto of the parent's decision about continuing the relationship, especially where the parent had been unaware of or had actively discouraged the relationship. Because there is not an equivalency of interests, for constitutional purposes, between a legal parent and a nonparent, *Rivera*, 483 U.S. at 581, even one whose relationship is significant to a child, a second threshold factor that gives appropriate weight to parental autonomy in light of the intrusion at issue also is necessary to achieve a proper constitutional balance. The state needs to have a sufficient reason to intervene and to assess the parent's view of her child's welfare.

A showing that an involved parent had previously exercised her autonomy to permit or encourage the child to form an exceptionally strong bond with the petitioner provides cause for the state to assess the parent's decision to cut off or circumscribe such an important relationship. *See, e.g., In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419 (1995), *cert. denied*, 516 U.S. 975 (1995) (permitting visitation by lesbian former partner upon showing including parental fostering of important relationship with her child). When it was the parent's exercise of autonomy that fostered formation of a close relationship between her child and the nonparent in the first place, the parent has herself affirmed its importance to the child, underscoring that there is sufficient basis for state concern about the child's need for continuing that relationship. *Compare Smith v. Organization*

events, they are, of course, relevant. Nevertheless, statutes opening the courthouse door only upon specified disruptions are unduly limited, and they may raise other constitutional issues not now before the Court. Continuing an unusually significant relationship in a child's life can be a vital need, and the state is justified in addressing it even absent circumstances such as death, divorce, or custody litigation.

of Foster Families, 431 U.S. 816, 846-47 (1977) (giving substantial weight to fact that parent expressly intended not to subordinate autonomy to claim of foster parent in denying foster parent visitation; parent's agreement to allow relationship with foster parent to form was contingent on contract to regain full autonomy); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 865, 876 (1997) (state's interest in prohibiting "indecent" communications to minors not as strong where parent wishes to disseminate messages to children for their benefit). In the context of visitation proceedings, the burden imposed on the parent's liberty falls well short of a complete deprivation of core custodial rights and therefore a demonstration that the parent previously fostered the significant relationship sufficiently guards parental rights to autonomy.

Allowing children to be around relatives or other individuals on periodic vacations or while, as here, they are in another's care, or sending a child for visits with neighbors or to day care, or briefly sharing a family home with another — all of these are qualitatively different from intentionally fostering a relationship of dependency, caregiving and significant emotional depth between one's child and a nonparent. The former examples are necessary and routine interactions in a child's life and should be possible, even encouraged, without causing parents to wonder if their rights to parental decision-making will be diminished thereby. This is, of course, particularly true of placing children in the hands of a compensated caretaker whose relationship to the children is literally purchased by the parents and revocable at their will. Parents should not be inappropriately chilled in exercising their liberty interest in caring for and socializing their children.

But where a petitioner can produce sufficient evidence that a legal parent exercised his discretion and authority to foster development of a significant relationship between the parent and child over time, presumably because he believed it in the child's best interests, the parent's later claim that continuing the relationship is a significant infringement upon his autonomy, while relevant to ordering visitation, should not bar petitions. The parent's constitutional interest must cede enough to allow evaluation of whether the loss of a relationship the parent himself encouraged to gain importance is adverse to the child's interests. Such a threshold element provides sufficient consideration of parental liberty interests, balanced against the interests of the child in maintaining these significant bonds, to consider entry of a visitation order in favor of a nonparent.

Many courts have looked to just such factors, particularly in cases involving gay and lesbian couples who parent jointly. Indeed, the latter situation exemplifies why the proposed threshold is workable and sound. These cases typically involve a long-term lesbian or gay couple who had decided jointly to raise a child as equal parents, chosen one partner to be a biological or adoptive parent, followed through on their agreement and some years later broke up. In the throes of the relationship's end, or shortly after, the biological parent goes back on the parties' understanding. She claims a right, based on her standing as the sole parent as defined by statute, to deny her former partner any further contact with the child she had brought into the world, closely nurtured and supported. In such circumstances, numerous courts responsibly have held that both adult-child relationships are entitled to protection, with the nonbiological partner receiving at least visitation with the child she had long raised and always treated as her own. Key to these decisions has been the constancy and unique quality of the bond between

petitioner and child, and the fact that the legally recognized parent actively fostered the relationship over time. *See, e.g., Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419; *V.C.*, 319 N.J. Super. at 114, 725 A.2d at 20; *J.A.L.*, 453 Pa. Super. 78, 682 A.2d 1314; *A.C.*, 113 N.M. 581, 829 P.2d 660.

In the case at bar, the Court finds petitioners whose feelings for their grandchildren are, by all appearances, loving and positive, but whose contact with them has not been extended or out of the ordinary. Pet. Br. at 2. Moreover, their visitation was never terminated by respondent, merely lessened. The contact petitioners enjoyed before seeking court intervention seems to have occurred largely secondhand, as a happenstance of other close family members caring for the child. *Id.* It may be that petitioners could meet a higher threshold standard if the statute is revised and they attempt to pursue visitation under a new statute. They were not asked to do so here. On this record, it cannot be said that the relationship is characterized by the kind of caregiving or fundamental importance that sets it apart from other bonds and merits consideration of a court order substituting for the surviving parent's judgment. Nor does it appear that the children's legal parent intended to foster an unusually significant relationship between them and petitioners. Even close relatives desiring court-ordered visitation should not be able to rely on the fact of kinship alone to establish a relationship sufficient to invade the parent's autonomy over child-rearing through court-ordered visitation.

Nor should respondent receive less protection for her constitutional liberty interest as a parent because she never married the children's father, because they separated, or because he has died. The Constitution's protections for families are not limited to married, two-parent couples. *Michael H.*, 491 U.S. at 123 n.3; *Moore*, 431 U.S. at 505. Liberty interests in childrearing are individually held, and the

fact that one parent is absent or deceased does not transfer rights to extended family members or decrease protections afforded remaining parents or their children. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (state cannot deprive unwed father of his parental rights upon death of mother without showing of unfitness); *Levy v. Louisiana*, 391 U.S. 68, 71-2 (1968) (children of unwed parents may not be denied wrongful death action available to other children; "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong inflicted on the mother"). *Cf. Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995) (striking down grandparent visitation statute under state constitution and holding that a parent's liberty interest is unaffected by whether family is "intact" or divorced). Respondent, a fit and active parent, is entitled to full protection of her parental autonomy interests, including the right to make changes in her children's lives upon the death of their biological father, without undue interference from the state or surviving relatives. Were it otherwise, parental autonomy could be destroyed by petitions from multiple grandparents and other well-meaning friends and kin, perhaps just when the surviving parent-child bond is most vulnerable and in need of protection.

C. A Contextually Appropriate Best Interests Of The Child Standard Is Sufficient, After Threshold Requirements Are Established By Evidence, To Order Nonparent Visitation.

A statute that observes the two constitutional minimums suggested here or a comparable threshold for petitioning, and then goes on to the traditional requirement all states employ of determining if a visitation order will serve the child's best interests, Averett, 13 B.Y.U. J. Pub. L. at 356, will not impose too strongly on parental liberty given the

infringement at issue. Review under the best interests standard requires the court to consider factors as extreme as abuse or indiscretion from which the child should be shielded, but also more mundane effects on decisionmaking such as changes in schedule, activities and school and neighborhood choices. A contextually appropriate best interests standard for ordering visitation also will consider an involved parent's explanation of why contact was ended or curtailed, or comparable factors. *See, e.g., N.H. Rev. Stat. Ann.* § 458:17-d II (1992); *Ariz. Rev. Stat. Ann.* § 25-409 (West 1997). In addition, a best interests test also properly considers any negative impact of court-ordered visitation on the parent-child bond, which is a key concern, *see, e.g., N.J. Stat. Ann.* § 9:2-7.1.b (West 1998); 23 *Pa. Cons. Stat. Ann.* §§ 5311-5313 (West 1997), as well as the positive aspects of continuing the significant relationship with the nonparent.

The best interests standard also would require consideration of the extent of any emotional, financial or other detriment to the child that would be ameliorated by ordering visitation. But the "severe psychological harm" contemplated by the Washington court, *Custody of Smith*, 137 Wash. 2d at 20, 969 P.2d at 30, is not required to justify the intrusion of visitation if the proposed threshold standard is met. A lesser showing of detriment is adequate because nonparent visitation decrees do not completely deprive parents of their autonomy, nor do they transfer core custodial rights.[11] A court order may appropriately be entered to spare

[11] Orders that allow excessive visitation impose more directly upon the core of the legal parent's interest in custody and control, as do provisions that accord decisionmaking power on significant matters to nonparents or restrict other fundamental rights, such as the right to travel. State courts have acted to invalidate or amend such decrees to protect parent-child interests. *See, e.g., Herndon,* 857 S.W.2d at 210-11 (upholding grandparent visitation statute against federal constitutional

a child the detrimental experience of an emotional loss or, especially for younger children, the loss of a consistent caregiver or provider.

Such a standard, after the required threshold factors are met, is adequately calibrated to the intrusiveness of visitation orders. These orders do restrict parental autonomy and control over a child's upbringing by forcing schedule and other accommodations. But even with a visitation decree in place, the petitioner cannot pull children in or out of school, enroll them for religious training, authorize non-emergency medical care, or make other critical decisions in the upbringing of a child without the legal parent's consent. These orders do not prevent exercise of core custodial rights or substantially hamper the parent's say over his child's development. Legal parents retain their freedom to determine fundamental matters such as schooling, religion, medical care and the like. Moreover, while being subject to court orders and a court's continuing jurisdiction is intrusive and can be manipulated, the fact that visitation orders are malleable and subject to amendment in response to changed circumstances lessens the gravity of the harm.

challenge but striking down visitation order comparable in scope to that awarded legal parents).

CONCLUSION

For all the reasons stated above, the judgment of the Washington Supreme Court should be affirmed.

Date: December 13, 1999

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IN THE
SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE VISITATION OF NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, MINORS

JENNIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

Brief of the Domestic Violence Project Inc./Safe House (Michigan); the Pennsylvania Coalition Against Domestic Violence, Inc.; the Florida Coalition Against Domestic Violence, the Iowa Coalition Against Domestic Violence, and the Missouri Coalition Against Domestic Violence as *Amici Curiae* in Support of Respondent.

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STATEMENT OF INTEREST OF *AMICI*

Amici are comprised of various non-profit state organizations and coalitions dedicated to addressing the legal and societal problems facing children, low-income families, and survivors of domestic violence.

Amici's collective experience has shown that the effects of reversal of the decision of the Washington Supreme Court, and the resulting potential for increased third-party interference in otherwise fit families, will have a devastating impact on children in terms of security and stability. Children will be subjected to arduous legal proceedings between parents and third persons, leaving them open to manipulation and stress.

Amici have first hand experience in addressing the problems of low-income families and understand the fundamental burdens (financial and emotional) placed on such families in third-party intervention cases.

Amici have first hand knowledge of the effects of domestic violence on children. Children are harmed whether they are themselves abused or they witness the abuse of a parent. However, many adverse consequences of observing or experiencing violence can be averted or mitigated in children if the child is protected against future maltreatment and is shown parental role modeling of non-violence. *Amici* have first hand experience with the common occurrence of the abuser's relations intervening in child-related proceedings, and the increased probability that the children will continue to be exposed to abuse.[1] See Appendix.

SUMMARY OF ARGUMENT

The crux of Petitioners' (and supporting *amici's*) argument is that the State can substitute itself as a parent in fit families and make the individualized day-to-day decisions that

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1 Consent has been granted by both parties for *amici* to file this brief. There have been no monetary contributions except by *amici*.

go the heart of being a parent. However, as discussed in this brief, the concept of *parens patriae* is not applicable unless parents have acted in a way which falls below certain minimum standards of fitness, creating a situation which causes harm to a child.

The most fundamental right that exists in our society is that fit parents can make decisions concerning their children free from intrusion by the State or any third person. All natural (including adoptive) parents, whether part of a two-parent family, divorced, or single parents, have this right. This is not a difficult or complex concept. It recognizes the central premise that parents are presumed to act in the best interests of their children. The State has a duty to ensure that all parents act within a minimal "objective" standard of fitness that ensures the physiological safety of the child. The State, however, does not have a right, in the face of the Constitutionally protected parent-child relationship, to interfere in decisions that do not bear on parental fitness. Parents should not lose the right to parent their children when their decisions do not fall below certain minimal standards of behavior.

Petitioners desire to go far beyond the State ensuring minimal "objective" levels of fitness. They seek a society where the courts second-guess the truly private and subjective decisions made by parents as part of daily life. These decisions include deciding with whom children may associate, the choice of children's religion, how to educate children, and imparting parental views on social and moral issues.

Petitioners' argument is premised on the idea that allowing third-person visitation is not a sufficient enough intrusion to violate the constitutional protections surrounding the fit parent-child relationship. Petitioners would define the rights of parent and child in terms of acceptable intrusions into that relationship. However, at issue is not the level of intrusion, but the intrusion itself. Petitioners ignore the fact that there is no inherent right for third persons to intrude into the parent-child relationship.

Third person rights to visitation and custody are legislatively created and vary widely from jurisdiction to jurisdiction. These legislative creations cannot compete against the Constitutionally protected parent-child liberty, privacy, and association interests that "derive from blood relationship, state-law sanction, and basic human right..." Smith v Organization of Foster Families (OFFER), 431 US 816, 846 (1977). To allow such a "localized" legislative approach sets up a slippery slope which would allow thousands of individualized cases from numerous jurisdictions to define a fundamental Constitutional right. On a practical level, a family moving from Vermont to California may be faced with very different statutory intrusions into the integrity of the relationship between parents and children with little or no notice of such changes.

This brief will address the serious Constitutional, societal, and policy issues raised by allowing the State, through the petitions of third persons, to intervene in parental decisions which do not affect the fundamental health or safety of children or raise issues of objective fitness to raise children.

ARGUMENT

I. THE NATURAL PARENT CHILD RELATIONSHIP IS PROTECTED BY CONSTITUTIONAL LIBERTY AND PRIVACY RIGHTS, AND THE APPLICATION OF STRICT SCRUTINY, FROM INTRUSIONS BY THIRD PERSONS.

Any third-party interference with the parent-child relationship, which includes third-person or grandparent visitation, is subject to review in light of the constitutionally protected liberty, privacy, and associational interests between natural (including adoptive) parent and child.[2] Cases involving

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[2] Third persons are non-parents - persons who are not natural (i.e.

State intrusion into parental choices on child rearing are subject to a strict scrutiny analysis. This Court has noted its "historical recognition that freedom of choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Santosky v Kramer, 455 US 745, 753 (1972). "[T]he Fourteenth Amendment forbids the government to infringe fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Washington v Gluckberg, 521 US 702, 721 (1997)(citing Reno v Flores, 507 US 292, 302 (1993)). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v City of East Cleveland, 431 US 494, 503 (1977). The Constitution prohibits any intrusion into the parent-child relationship absent established substantive and procedural due process protections, specifically a requirement of a finding of unfitness in appropriate proceedings as a prerequisite to intervention. The Washington statutory provisions before this Court contain no such prerequisite.

A. A FUNDAMENTAL LIBERTY INTEREST EXISTS BETWEEN PARENT AND CHILD

This Court has held that the care, custody and control of one's children comprise a fundamental natural and constitutional right. Smith v Organization of Foster Families (OFFER), 431 US at 845 (1977); Stanley v Illinois, 405 US 645, 651 (1972); Santosky v Kramer, 455 US 745, 758 (1982). See also In re Clausen, 442 Mich 658, 502 NW2d 649 (1993); In re LaFlure, 48 Mich App 377, 385, 210 NW2d 482, lv den 380 Mich 814 (1973)(right to the custody of his or her children is an element of the "liberty" guaranteed by the Fifth and

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biological) or adoptive parents. See e.g. Michigan Compiled Laws §722.22(c) "[t]hird person" means any individual other than a parent.

Fourteenth Amendments of the Constitution of the United States).

In Stanley, 405 US at 651, this Court emphasized the paramount importance of the natural parent-child relationship:

> [T]he rights to conceive and to raise one's children have been deemed essential ... basic civil rights of man. and [r]ights far more precious ... than property rights. ... It is cardinal with us that the custody, care, and nurture of the child reside first in the parents. ... The integrity of the family unit has found protection in the Due Process clause of the Fourteenth Amendment, ... the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment ... (citations omitted).

See also Santosky v Kramer, 455 US at 758 (1982)

The Fourteenth Amendment applies where there is "state action." A state court custody or visitation decision constitutes state action for purposes of the Fourteenth Amendment of the United States Constitution. See Palmore v Sidoti, 466 US 429, 432 n.1 (1983)(custody decision). The State acts through the use of its courts and judiciary. Shelly v Kraemer, 334 US 1, 14 (1948); Ex parte Virginia, 100 US 339, 346-347 (1880

In Smith v OFFER, 431 US at 845, this Court states that the parent–child relationship is recognized and protected under the Constitution:

> The individual's freedom to marry and reproduce is 'older' than the Bill of Rights ... [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in the intrinsic human rights, as they have been understood in 'this Nation's history and tradition'...

The Smith Court found that the natural parent-child liberty

interest is derived from "blood relationship ... and basic human right." Id. at 846. Lehr v Robertson, 463 US 248 (1983); Franz v United States, 707 F.2d 582, 602 (D.C. Cir. 1983)(custody and care comprise all of what we call natural parental rights). See also Olmstead v. U.S. 277 U.S. 438, 478 (1928) (Brandeis, J, dissenting), describing "the most comprehensive of rights and the right most valued by civilized men," namely, "as against the government, the right to be let alone."

Our essential rights are not created by pieces of paper; "[t]hey are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power ... In short, they are founded on the immutable maxims of reason and justice." [John Dickinson], *An address to the Committee of Correspondence in Barbados* (1766), quoted in Bernard Bailyn, The Ideological Origins of the American Revolution, at 187 (1967).

B. THE PARENT-CHILD RELATIONSHIP IS PROTECTED BY THE FIRST, NINTH, AND FOURTEENTH AMENDMENT RIGHTS OF ASSOCIATION AND PRIVACY

"Choices about ... the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' (Boddie, 401 U.S. [371] at 376, 91 S. Ct., at 785 [1970]), rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). Although not explicitly mentioned in the Constitution, it is well settled that associational rights are also guarded by the First Amendment. City of Dallas v. Stanglin, 490 U.S.19, 23-24 (1989). This Court has concluded that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role

of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Id.

It follows that the associational rights of parents and children are also protected by the First Amendment. "We have emphasized that the First Amendment protects those relationships *including family relationships*, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life." Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) (emphasis added). "[T]he Court has held that the Constitution protects against unjustified government interference with the individual's choice to enter into and maintain certain intimate or private relationships." Id. 481 U.S. at 544.

Thus, since associational rights are fundamental rights protected by the First and Fourteenth Amendments, parents and their children cannot be compelled by the State to associate with third persons against their will, especially in the absence of any actual or threatened harm to the children. "Freedom of association therefore plainly presupposes a freedom not to associate." Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (citing Abood v. Detroit Board of Education, 431 U.S. 234-235 (1984)). See also Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292 (1986).

Certainly the associational rights of parents and their children deserve constitutional protection that is equal to the above cases, especially since fundamental liberty and privacy rights are also at issue.

The Washington statute impermissibly infringes on these rights of association and privacy. The State seeks to compel parents to allow visitation of their children with third persons who may expose children to different religious views, who have different philosophies on child rearing and discipline, or who may harbor views repugnant to the parents. Parents have the right to decline such association for any reason or for

no reason at all. Reversing the decision of the court below would constitute a substantial departure from existing precedent on associational rights and the State's parens patriae authority.

C. THERE ARE NO CONSTITUTIONAL PROTECTIONS OF THE RELATIONSHIP BETWEEN A THIRD PARTY AND A CHILD AS AGAINST NATURAL PARENT AND CHILD; THE CONSTITUIONAL PROTECTIONS EXTEND MUTUALLY ONLY TO NATURAL PARENT AND CHILD.

Third parties have no inherent rights to visitation, let alone custody of children.[3] Smith v OFFER, supra, involved third-party foster parents' attempts to have input in determining the custody of children. The Court refused to acknowledge the claimed "liberty interests" of the foster parents.

> It is one thing to say that individuals may acquire a liberty interest against arbitrary government interference in the family-like associations into which they have freely entered, even without biological connection or state law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood

[3]"There are no inherent rights of third parties to request custody or visitation of another person's child ... [T]hird-party custody flies directly in the fact of Constitutionally protected rights" of association between parents and their children. Victor, Bassett, Robbins, Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support, 25 Family Law Quarterly, p. 19 (1991).

> relationship, state-law sanction, and basic-human right...

Id. at 846. This Court recognized that foster families develop a relationship with children, but specifically found that they have no rights as against the natural child-parent relationship and refused to permit the state-created interests of the third parties, the foster parents, to rise to the level requiring the same due process rights guaranteed to natural parents.

In re Clausen, supra, reaffirmed these Constitutional principles in a nationally debated custody case. The Michigan Supreme Court did not balance claimed interests of the third person petitioners against the natural parents, and applied constitutional protections only to the natural parent-child relationship, recognizing the "mutual due process liberty interest" between natural parent and child. 442 Mich at 687, fn. 46. The court specifically rejected an attempt by the third party custodians who "maintain[ed] that there is a protected liberty interest in their relationship with the child, which gives them standing..:."

> We reject these arguments. ... It is not enough that a person assert to be a "contestant" or "claim" a right to custody with respect to a child. If that were so, then any person could obtain standing by simply asserting a claim to custody, whether there was any legal basis for doing so or not. The Court of Appeals has correctly read our decision in Bowie as requiring the existence of some substantive right to custody of the child. We adhere to the holding of Bowie that a third party does not obtain such a substantive right by virtue of the child's having resided with the third party. Id. at 687.

The Clausen court stated that the United States Supreme Court cases relied upon by the third parties:

> ... do not establish that they have a federal

> constitutional right to seek custody of the child. ... While some of those cases place limits on the rights of natural parents, particularly unwed fathers, they involve litigation pitting one natural parent against the other, in which, almost of necessity, one natural parent must be denied rights that otherwise would have been protected ... Id. at 683-684 (discussing, among other cases, Quillon v Walcott, 434 US 246 (1978)).

The rights of natural parent and child do not diverge unless there is a finding of unfitness or unless the parent has voluntarily terminated parental rights in an appropriate proceeding with all attendant due process protections. See note 5, infra. The Michigan Supreme Court repeatedly stated in In re Clausen, supra, that:

> While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit.
>
> * * *
>
> The mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness. As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing, sometimes despite the preferences of the child. Clausen 442 Mich at 687 (emphasis added).

The fundamental right to family integrity does not belong to the parent alone, but also to the child. The right "extends to a mother and her natural offspring." Duchesne v Sugerman, 566 F.2d 817, 825 (2nd Cir. 1977). The natural parent and child are identified as one, absent unfitness. Familial rights are relationship rights between parent and

child and are "not the individual interests of either parent or child." Bohl, Joan, "*'The Unprecedented Intrusion': A Survey and Analysis of Selected Grandparent Visitation Cases*," 49 Okla L. Rev. 29, p. 46 (Spring 1996). The rights of fit parent and child are not in competition, and are not balanced against each other.[4]

D. IN THE ABSENCE OF UNFITNESS, THERE IS NO COMPELLING STATE INTEREST JUSTIFYING ANY INTERFERENCE INTO THE PARENT - CHILD RELATIONSHIP.

The primary protection of the natural parent-child liberty interest is that parental custody may not be disturbed absent a showing that the natural parent is unfit. This "objective" standard recognizes both the liberty and other interests attached to the natural parent-child relationship and the societal interests in preserving that relationship. The instant case, unlike an abuse and neglect proceeding, does not involve allegations of unfitness.

As opposed to a "subjective" and wide-ranging best interests comparison between parties, the more objective fitness test focuses on the parent and is not a comparison with other proposed custodians. The best interest test has historically been used in divorce proceedings between competing parents who have the same Constitutional rights with respect to each other. For example, in both Lehr v Robertson, supra, 463 US and Quillon, supra, each a stepparent adoption case, the child was living with one natural parent so the cases involved natural

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4 There is nothing in the inherent and Constitutionally protected parent-child relationship that limits that right to two-parent families. The right is intact for all fit parents and their children. See e.g. Rust v Rust, 846 SW2d 52, 56 (Tenn. Ct. App 1993)(single-parent family unit entitled to similar measure of constitutional protection against unwarranted governmental intrusion as accorded intact two-parent family).

parent against natural parent. In such situations, a best interest standard is appropriate. See Sheppard v Sheppard, 630 P2d 1121 (1981)(discussing Quillon). Cf. Moore v City of East Cleveland (recognizing grandparent-child relationship, but not as asserted against natural parent-child relationship).5

When the case involves a third person who has no inherent rights of custody or visitation as against natural parents, parents must be shown to be unfit before the State may intrude and impose third person association. Alleging that such association may be in the child's best interest is insufficient. See Smith v OFFER; Stanley v Illinois, Santosky v Kramer, supra; Sheppard, supra.

In Parham v J.R., 442 US 584 (1979), counsel for a child sought to argue that the child had a competing liberty interest (in the child's admission to a mental health care facility) which needed to be balanced against that of the natural parents. This Court, recognizing the long-standing presumption that parents act in the best interests of their child, rejected this argument, concluding "that our precedents permit the parents to retain a substantial, if not the dominant, role in that decision, absent a finding of neglect or abuse ... " Id. at 604. (emphasis added).

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5 A best interests test is comprised of a number of considerations which compare the competing parties. In Michigan, for example, these highly subjective factors include assessing the love and emotional ties between the child and the parents or parties, the capacity of the parties to give affection, to provide food, clothing, and other staples of life, the moral, physical, and mental fitness of the parties, the reasonable preference of the child, the willingness to facilitate visitation, and any other factor the court may deem relevant. See eg Mich Comp Laws Sec. 722.23. The Michigan statute does include consideration of whether there has been domestic violence, however, the paucity of case law on the topic in Michigan suggests that this factor is given little consideration. See Issue II (discussion of third party cases and domestic violence). While a fitness standard will always contain some subjectivity, it's an individualized focus on the parent while the best interests tests by their nature are subjective comparisons.

> If a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the State cannot enter." Smith v OFFER, supra, 431 US at 863, citing Prince v Commonwealth of Massachusetts, 321 US 158, 166 (1944).

See also Meyer v Nebraska, 262 US 390, 399-400 (1923)(child rearing "central part" of liberty protected by due process clause); Pierce v Society of Sisters, 268 US 510, 534-535 (1925); Santosky (finding of parental unfitness required);. Clausen, supra at 687(reiterating finding of unfitness before intrusion by third person)6

In issuing its decision in Clausen, the Michigan Supreme Court discussed a long line of custody cases where the rights of natural parents were not disturbed in the absence of findings of unfitness, sometimes despite the preferences of the child. Id. at 687, citing Burkhardt v Burkhardt, 286 Mich 526, 282 NW 231 (1938); Liebert v Derse, 309 Mich 495, 15 NW2d 720 (1944); Riemersma v Riemersma, 311 Mich 452, 18 NW2d 891 (1945); Herbstman v Shiftan, 363 Mich 64, 108 NW2d 869 (1961). Clausen, supra, at 681-682.

The Washington Supreme Court has followed an

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6 Each state has an appropriate forum for the determination of parental unfitness. The appropriate forum in Michigan, for example, is a probate proceeding, where Michigan law provides procedural and substantive protections of the parent-child relationship See Ruppel v Lesner, 521 Mich 559, 565, 364 NW2d 654 (1984), that there must be a finding of parental unfitness in an "appropriate" abuse or neglect proceeding in probate court Discussing such proceedings under the juvenile code. See Clausen, supra at 687, fn. 46,"[a] determination can be made regarding whether the parents' unfitness so breaks the mutual due process liberty interests as to justify interference with the parent-child relationship."

analysis of parental rights parallel to that of the Michigan Supreme Court in Clausen. The Washington Court likewise reviewed the decisions cited by the Petitioners in support of their claim that "best interests" of the child may warrant the exercise of the state's parens patriae power, and, as did the Michigan Supreme Court, soundly rejected this interpretation. "The Supreme Court cases which support the constitutional right to rear one's child and the right to family privacy indicate that the state may interfere only 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. Wisconsin v Yoder, 406 U.S. at 234." In re Custody of Smith, 137 Wash.2d 1, 17; 969 P.2d 21, 29 (1999). This is not a question of standing. It is a question of the State's authority to intervene into a fit family

Similarly, this Court denied the third-person petitioners' Motion for Stay in Clausen, rejecting the position that their relationship with the minor child eliminated the requisite of parental unfitness prior to third-party intervention:

> Neither Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: "[C]ourts are not free to take children from parents simply by deciding another home appears more advantageous." *In re B.G.C.*, 496 N.W. 2d 239, 241 (1992) (internal quotation marks and citation omitted).

Clausen v Deboer, 509 US 1301, 1302 (1993)(Opinion of Justice in Chambers). (emphasis added.)

This Court must again reassert the proposition that third-party interference is inappropriate absent parental unfitness. Third-party visitation cannot be imposed over the objections of otherwise fit parents.

Numerous cases from various jurisdictions have applied due process protections, including a fitness standard, to the natural parent-child relationship in cases involving third- party intrusions, including seeking visitation. See e.g. Beagle v. Beagle, 678 So.2d 1271 (S Ct Fla. 1996)(grandparent visitation statute found unconstitutional under federal and state constitutions as state may not intrude upon parents' fundamental right to raise their children except where child is threatened with harm); Peterson v Rogers, 445 SE2d 901 (S Ct NC 1994)(fit parents entitled to custody of children; best interest test unconstitutional); Brooks v Parkerson, 265 Ga 189, 454 S.E. 2d 769, cert. denied. 516 US 942 (1995)(Georgia grandparent visitation statute unconstitutional under Georgia and federal constitutions, state cannot interfere with parental rights to custody and control of children except in cases where health and safety is threatened)7; Hawk v Hawk, 855 SW2d 573 (Tenn. 1993)(holding unconstitutional Tennessee's grandparent visitation statute under state constitution); Ex Parte Woodfin v Bentley, 596 So2d 918 (S Ct. Ala 1992)(finding that a showing of parental unfitness is required in custody case between parent and third party custodian and returning child to mother);8 In the Matter of the Guardianship of Williams, 869

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7 In Brooks, at 773, the Georgia Supreme Court held the statute "falls short both in its apparent attempt to provide for a child's welfare and in its failure to require a showing of harm before visitation can be ordered. ... [T]here is insufficient evidence that supports the proposition that grandparents' visitation with their grandchildren always promotes the children's health or welfare." Such a proposition is indeed based on subjective, personal views of what is "best" for a child, as opposed to a determination of what is needed to ensure that a child is safe from objective harm.

8 As stated in Woodfin, supra,

So strong is this [parental presumption] … that it can be overcome only by a finding, supported by competent evidence, that the parent seeking custody is guilty of misconduct or neglect to a degree which renders that parent an unfit and improper person to be entrusted with the care and upbringing of the child in question. Id. At 920.

P2d 661 (S Ct Kan. 1994)(Kansas Supreme Court striking down the best interests test in challenges between a parent and third party, following a line of cases in Kansas as well as the "rule, in one form or another, in a majority of the jurisdictions in this country" that fit parents are entitled to custody without challenge by third person); Drummond v Fulton County, 237 Ga 449, 288 SE2d 839 (S Ct Ga 1976), cert denied, 432 US 905 (dismissing as unconstitutional a foster parent claim based on a "best interest standard" and finding the "best interest standard" only applicable between natural parents who have equal interest in the child-parent relationship); Sheppard v Sheppard, 630 P2d 1121 (S Ct Kan 1981) (finding unconstitutional a statute authorizing courts in divorce and custody cases to award custody to third parties absent a finding of parental unfitness).

As these cases show, a parent's (and child's) Constitutional rights are not less affected when, as in a visitation case, the interference in the family may not be permanent or irreversible. These decisions are consistent with this Court's handling of the related issues in Stanley v Illinois.

In Stanley, the Court reversed and remanded a decision where a parent was denied custody pursuant to an Illinois Dependency Statute where there was no finding of parental unfitness. There, an unwed father's access to his children was severely limited under an Illinois dependency statute due to the death of the children's mother; the father was left with only the opportunity to act as a guardian for his own children. There was no finding of parental unfitness, and the case was not a parental termination proceeding. This Court found that the dependency statute "empowers state officials to circumvent neglect proceedings." Stanley, 405 US at 649. Under the Illinois Neglect Statute, the father would have been entitled to an array of procedural protections, including a fitness determination, while under the Dependency Statute, he experienced no such protections. This Court reversed the Illinois Court and remanded the case for additional procedures consistent with the Due Process and Equal Protection Clauses. The Court further

held that the constitutional protections were not satisfied by the suggestion that the father could have regained custody through adoption or guardianship proceedings. The Court, in finding due process and equal protection violations, stated that "such restricted custody and control" of children pursuant to a guardianship statute was not full parenthood and constituted a violation of the parent-child relationship. Id. 405 US at 648-649.

Thus, if the minimally restricted "custody and control" of children in Stanley violates the Constitution, imposition of third person visitation upon objecting fit families constitutes a violation of the parent-child relationship.

This Court has held that a State may exercise its parens patriae power only when there is harm or threat of harm to the child. Wisconsin v. Yoder, 406 U.S. at 230. " It is insufficient for the state to show that the Washington statute may further an interest that the State may find important. It is not the "level" of the interference that is the issue, it is the very fact that there is any interference at all into a fit family.9

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9 The Washington dissent admits that "historically the natural parent's right to custody of a child ... [was considered to be] absolute, barring a showing of unfitness." In re Custody of Smith, supra, 137 Wash 2nd 1, 24-25, 969 P2d 21, 32-33 (dissenting opinion):

> It is now well established that when parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a parens patriae right and responsibility to intervene to protect the child. Id. at pg. 12 .

The dissent, however, fails to support its desired conclusion that the State has developed other less fundamental interests that justify intrusion into a fit family. The dissent attempts to distinguish Wisconsin v. Yoder, 406 U.S. 205 (1972) , arguing that it involved claims that state action intruded on both the liberty interest in parental autonomy and First Amendment rights. To the extent that the dissent seemingly requires some type of additional "rights" to be involved before protecting the parent-child relationship, it ignores the fact that privacy, associational, and liberty interests are already subsumed within the protected right of parent and child. See Smith; supra; M.L.B. v. S.L.J, supra; Board of Directors of

There is an articulated, fundamental liberty interest between natural parents and their children. Allowing any person, even grandparents, to seek visitation over the objection of fit families, ignores that there is no Constitutional liberty, privacy, or associational interest in a relationship between a third person and a child, even when a child has resided with a third person.

II. THIRD PARTY INTERVENTION CREATES FUNDAMENTAL BURDENS ON ALL FIT PARENTS AND THEIR CHILDREN

The holding suggested by the dissent in the Washington Supreme Court case will create significant problems for children and their fit parents, particularly vulnerable families facing poverty and those seeking to permanently leave a violent home.

A. INTERFENCE INTO FIT FAMILIES CREATES INSTABILITY FOR CHILDREN

There is no question that the very fact of litigation polarizes the parties and leaves the child somewhere in the middle. No matter how hard the system may try to convey a

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Rotary International, Roberts, Abood, Chicago Teachers Union, City of Dallas v. Stanglin, supra

Additionally, Petitioners cite Boggs v. Boggs, 520 U.S. 833 (1997) for the proposition that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States," Id at 848, as a means of exempting state enactments concerning families from constitutional scrutiny. However, Boggs dealt with ERISA preemption of state community property laws and thus did not implicate fundamental parent-child liberty, privacy and associational rights, as does the present case. Therefore, it is inconceivable that such fundamental rights would be analyzed under a "state's rights" doctrine.

"best interest" message, the real message to the child is that there is no stability and certainty in the child's world and the child cannot look to his or her own fit parent for guidance. Third persons, and the court, are substituted in as additional parental figures with the potential of playing each off the other. Children are placed in the untenable position between loved parents and third persons. This subjects a child to a form of psychological warfare:

> "Grandparent visitation disputes expose children to all the long and short term stresses of divided loyalty that come with family-law conflicts between parents. Not only do children encounter loyalty conflicts at the time of the dispute, but also they are likely to face long-term loyalty conflicts if a visitation order is granted." Sykora, Theresa, "*Grandparent Visitation Statutes: Are the Best Interest of the Grandparent Being Met Before Those of the Child*," 30 Family Law Quarterly 753, 761 (Fall 1996).

Grandparent visitation sounds innocuous – to be opposed to "grandparents" automatically makes one sound emotionally cold at best. However, grandparent visitation raises a number of fundamental concerns:

> Although many grandparents might ideally like more involvement with their grandchildren, very few grandparents will ever go to court against their own children to seek visitation. While grandparent visitation sounds innocent and even desirable, the reality is that the vast majority of grandparent visitation cases involve dysfunctional and high conflict families. Giving them visitation is likely to only put more stress on the children. Rather than encouraging such claims, we should be highly suspicious of them. Zorza, J. "*PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes*," Domestic

Violence Report, Vol. 4 No. 4, p.61-62 (April/May 1999).

Parents and children should not be placed in the difficult position of litigating against each other.10.

When a court orders visitation that parents do not welcome, "ill feelings, bitterness and animosity" between the parents and grandparent may intensify. Strouse v Olsen, 397 NW2d 651, 655 (S D., 1986). A court order will not serve the best interest of a child if it forces the child into an environment consisting of hostile and conflicting authority figures. Id.

Any third party litigation exposes parents (and consequently the children in the household) to arduous, and emotionally and financially draining court proceedings. Families would be litigating the fundamentally personal, private and subjective decisions concerning association for their child.11

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10 Pitting a child against a fit parent violates the mutual parent-child liberty interest. A family is not just the sum of its parts: a mother, father, sister, brother. Likewise, a family is not an arena for the competing "liberty interest" of each family member to be "happy" individually. Families are dynamic relationships that change with time and circumstance. At one moment, family members' happiness may be subordinated to the welfare of a sick child, or an unemployed father, or a mother who is finishing law school, or a brother who has yet to immigrate to this country. At another moment, a family may share their happiness in welcoming a new baby, a promotion, or a birthday.

11 There are numerous practical problems with such litigation. For example, if the "relationships" of a two-year-old child are at issue, whose interests and rights are truly at stake. The child cannot express a preference. Is a guardian ad litem then appointed for the child to make a recommendation based on the best interest factors concerning the significant relationship? Who pays for the guardian ad litem? Must a young family, who should be saving for a child's future, spend their money for their own attorney, court costs, and the costs of a guardian, as well as for various [costly] experts.

The use of a best interests test opens the door for subjective value judgments concerning the court's view of family:

> The best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for our children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data about what is "best" for children. The resolution of conflicts over children ultimately is less a matter of objective fact-finding that it is a matter of deciding what kind of children and families, what kind of relationships – we want to have." Weaver-Catalana, Bernadette "*The Battle for Baby Jessica: A Conflict of Best Interests*," 43 Buffalo Law Review 583 (Fall 1995)(emphasis added).

Wide discretion under the best interest factors raises the spectre of cultural, class, life-style and other types of bias and prejudice.12 The very subtle ramifications of social bias often invade custody and visitation decisions. Poorer, less educated parents will always look worse in relation to older, seemingly more established and settled grandparents, who often have significantly more resources. Social bias against fit, but single, parents will also affect decision makers.13

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12 There are other areas of concern raised by other amici supporting Respondent, specifically the role of gay and lesbian couples in relation to children. These concerns, however, can be addressed by state statutes authorizing gay and lesbian couples to adopt their partner's biological child where there is not another parent, or granting step-parent status in jurisdictions which have statutes providing for step-parent adoption. Likewise, guardianship provisions may also provide relief. These avenues of relief would not conflict with the central premise that fit parents are entitled to make decisions concerning their children.

13 A fit parent is a fit parent. Single and divorced parents should not be faced with different treatment that fit parents in two-parent households. See Rust, supra ; Frame v Nehls, 452 Mich 171, 550 NW2d 739 (1996)

Various factual situations can always arise which will appeal to our emotions. These emotional considerations, however, present inherent dangers and should never trump the very fundamental rights of association, privacy, and liberty between fit parent and child. Well-intentioned, yet highly subjective concerns will lead to a slippery slope of other, seemingly innocuous interventions of the parent-child relationship. The result is confusion and uncertainty, which ultimately works to the detriment of the child.14

"Courts are not free to take children from parents simply by deciding that another home offers more advantages." In the Matter of Burney, 259 NW2d 322, 324 (Iowa, 1977). Although visitation is not an award of custody, it is a removal of children from the care and control of their fit parents based on consideration of the "advantages" of a third person over a parent. Custody, care, and control comprise all of what we call "parental rights." Franz v United States, 707 F. 2d 582, 602 (D.C. Cir. 1983). Families are entitled to the reciprocity of both rights and responsibility.

> Even assuming that the parent makes a mistake in denying the child the right to see the grandparent, the fundamental right of parents to make decisions concerning their children must include the right to make wrong decisions. For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.

(paternity cases involving unmarried parents, finding that grandparents, compared to parents (including single parents), have no fundamental right to a relationship with the child, thus grandparents cannot argue equal protection).

14 See Clausen, 442 Mich at 674, stating "[c]ustody litigation is full of injustice – let there be no doubt about that. No system of law is perfect. Consistency in the application of laws goes a long way toward curing much of the injustice.

Sykora, 30 Family Law Quarterly at 762.

B. THIRD PARTY CASES DISPROPORTIONATELY IMPACT LOW-INCOME AND SINGLE PARENT HOUSEHOLDS, WHICH ARE PREDOMINENTLY HEADED BY WOMEN

Most low-income families consist of single parent households. Women head the majority of these single parent households.15 These are the families who most often seek support outside of the nuclear family, necessitated by an emergency, illness, homelessness, domestic violence, loss of employment, as well as job demands, military service, or school. Parents should always be encouraged to do what is in the best interest of their children, including temporary placement outside the home. Parents should not be punished for taking steps that are best for their children. They should not fear that permitting their child to develop a positive relationship with a grandparent or supportive neighbor (or in the alternative, limiting a relationship) will subject them to expensive litigation as the state permits increased third-person intrusions into the family, allegedly for the "best interests" of the child.

Low-income families are disproportionately disadvantaged when litigating against third parties who have more money and resources to sustain long and expensive actions. As the system currently stands, a financially strapped

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15 Symposium: Children, Divorce, and the Legal System: The Direction for Reform, 19 Columbia Journal Law and Social Problems 105, 115 (1985), citing House Select Committee on Child Abuse and Families: Current conditions and recent trends, Congress 1st Session 15 (1983). See also Weitzman, The Economics of Divorce: Social and Economic Consequences of Poverty, Alimony and Child support Awards, 28 UCLA Law Review 1181, 1241, 1249 (1981); Bruch and Wikler, Factors Figuring to Postdivorce Poverty, 63 Mich Bar Journal 472, 477 (June 1984).

party (usually a single mother) is overwhelmed by the prospect of a lawsuit. In visitation matters, there is no appointed counsel. There is nothing to equalize even partially the economic discrepancy between the lower income parent and the often higher income third party, and, contrasted to disputes between parents, there is often no ability of the court to enter child support orders or to order transfer of other items of economic value in order to equalize the two competing households financially. Often the simple filing of a lawsuit will result in a stipulated order for visitation because the lower income parent cannot pay an attorney. The parent without resources possesses no ability to even challenge the alleged "sufficient relationship" between the child and the third person (assuming there is such a statutory "standing" prerequisite), let alone continue into a second phase of litigation to defend their decision to sever the relationship.16

If forced to litigate to preserve parental autonomy, families will be divided into two classes, those who can afford to defend their parenting decisions, and those who will not be able to afford to do so.17

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16 The Brief submitted on behalf of the American Academy of Matrimonial Lawyers in support of Petitioners agrees that the Washington State statute is unconstitutional and also points to the financial and emotional costs associated with family disputes. However, they propose a bifurcated, and potentially, more expensive and complex system to resolve the appropriateness of third party visitation. Their proposal would require a court to first determine whether a third person has a "sufficient" relationship to the child and that the child's right to retain that relationship overrides parental discretion. (There is no age cut-off for determining the child's interest or wishes). The Academy states that once such "standing" is created, there is a legitimate state interest in forcing parents to defend their decision concerning terminating or even limiting association with the third person. There is nothing which defines what constitutes a "sufficient" relationship. Presumably a court would have great discretion in determining a "sufficient" relationship. This bifurcated approach raises numerous practical problems and subjects families to extended litigation essentially involving best interests comparisons.

17 All too often the decision that a low-income family cannot afford to defend is the decision to deny contact with a controlling or abusive third party.

C. THIRD PARTY INTRUSIONS CREATE FUNDAMENTAL BURDENS ON PARENTS AND CHILDREN SURVIVING DOMESTIC VIOLENCE

Most significantly, the potential for increased state-authorized third-person intrusions into family decisions has serious implications for those parents leaving an abusive spouse. As of 1992, the United States Surgeon General estimated that from 1.8 to 4 million women were victimized each year by domestic violence.18 Research suggests that men who abuse their spouses are also at significantly elevated risk of abusing their children:

> Children from homes where there is parent-on-parent violence are more likely to be physically abused themselves by the battering parent. A random survey of the U.S. population in the early 1980's revealed that 50% of men who battered a partner also severely abused a child more than twice a year, whereas only 7% of non-battering men severely abused a child at the same frequency. One report concludes that children who live in a home where violence occurs between adults are physically abused or seriously neglected at a rate of 1500% greater than that of the general population." (footnotes omitted), Field, Julie Kunce, "*But He Never Hit the Kids": Domestic Violence as Family Abuse,*" Michigan Bar Journal, September 1994, Vol. 73, No. 9, p. 922.

Battered women face daunting hurdles as they seek to

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18 Novell, A., From the Surgeon General, US Public Health Service, 23 J.A.M.A., 267 at 3132 (1992).

establish a home free of violence for themselves and their children. The same financial hardships that keep many survivors of domestic violence from leaving the assailant continue to plague them once they are separated. A custodial mother and her children face many changes as they establish a safe, violence-free household, perhaps starting new schools, moving away from friends, and changing day-care providers. "The greater the number of and the more frequent the changes, the greater is the likelihood of emotional and physical illness." Schecter and Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, for the conference, Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, Racine Wisconsin, June, 1994, page 13.

The risk of domestic violence is frequently greater after separation or breakup than during the co-habitation or the intimate relationship.[19] The custody fight itself may be a form of perpetuation of the abuse. "Often, abusers are more interested in trying to continue control and harassment over an ex-partner than in actually obtaining custody of the minor children."[20] "When domestic violence is not taken seriously, and because women are held to a much higher standard than men, abusers wind up with custody."[21] "All of the gender bias studies have shown that women are already badly disadvantaged in divorce and custody litigation because they

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19 Olvera, M., Custody and Visitation in the Model Code on Domestic and Family Violence, UNPUBLISHED PAPER, p. 14 (1994)(citing Mahoney, M.R., Legal Images of Battered Women: Redefining the Issue of Separation, MICH. L. REV, 90(1) (1991).

20 Saunders, Daniel, "Child Custody Decisions in Families Experiencing Woman Abuse, 39 Social Work 51 (January 1994); Chesler, P. "Mothers on Trial" The Battle for Children and Custody," Seattle, Seal Press (1987); Walker, L.E. and Edwall, G.E., "Domestic Violence and Determination of Visitation and Custody in Divorce" in Divorce," in D.J. Sonkin (ed.), Domestic Violence on Trial" Psychological and Legal Dimensions of Family Violence, New York, Springer (1987).

21 J. Zorza, "Using the Law to Protect Battered Women and Their Children," Clearinghouse Review, Vol. 27 n. 12 at 1440.

are held to a higher standard, seen as less credible, and have fewer financial resources necessary for effective representation. "Zorza, J. *"PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes,"* Domestic Violence Report, Vol. 4 No. 4 (April/May 1999), citing Karen Winner, Divorced from Justice: The Abuse of Women and Children by Divorce Lawyers and Judges (NY, Regan Books, 1996). In visitation matters, "reasonable visitation is never appropriate for batterers because they are not reasonable and will use the visitation as a license to abuse the visitation and continue to control and abuse their former partners." Field, Id. At 924.

Just as an abusive spouse will continue to litigate custody and visitation matters in order to control the domestic violence survivor, he may use his family to engage in similar tactics. Often, in cases involving domestic abuse, the parents of the abuser will file for visitation, and even custody. Zorza, supra . Although courts may limit contact between the abuser and the custodial mother and children, courts are less aware or savvy when it comes to relatives of the abuser. See Bohl, "*The Unprecedented Intrusion: Survey and Analysis of Selected Grandparent Visitation Cases,*" 49 Okla L Rev. 29 (1996). Courts may feel that children should have contact with the extended paternal family simply because contact with the abuser is limited. This, however, ignores the pervasiveness of abuse. Children will have increased chances of exposure to the abuser without adequate supervision. The tensions between the parties increase, the opportunity for an abuser to control increases, and the children are left in the middle:

> The Model Code [the Family Violence Model State Code developed by the National Council of Juvenile and Family Court Judges] instructs that the court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic of family violence, and recommends that supervised visitation be used as an option, with the supervision being done at a visitation center where staff understand

> domestic violence, child abuse and child development. Family members, including parents of the abusive spouse, are generally not good choices as supervisors, because they may also have been abusive, may not recognize an abuser's potential to seriously hurt the mother or child, or are in fact afraid of their abusive child. Field, Id. at 924.

This philosophy goes hand in hand with the doctrine of fitness, which requires that the State must ensure that all children are free from harm. The courts' primary duty is to ensure that children are in fit homes, and to ensure the basics of food and shelter. Additionally, implicit under the doctrine of parens patriae is the state's insurance of basic levels of education, truancy standards, and work restrictions concerning children. The use of the best interest standard, however, in third-person visitation situations, erodes the fundamental focus on fitness.

Even if third persons, including grandparents or other family members do not have a malicious intent in seeking visitation, they simply may not understand or respect the need of the survivor to reestablish her family without outside interference. Survivors of domestic violence must often leave the jurisdiction or reestablish a safe life for their children away from the abuse. See Field, p. 923. "Maintaining social support for the battered woman and her children through such major life changes is, therefore, critical. The need for supporting the remaining family unit – mother and children – in the aftermath of violence is consistent with current thinking in the area of family preservation." See Schecter and Edelson, supra, p.13.

> "In addition, based on my representation of over 200 battered women and my experience assisting in family law and domestic violence cases throughout the country as the senior attorney for the former National Center on Women and Family Law, maternal grandparents are far less likely to seek visitation than are paternal ones.

> Paternal grandparents often go to court to back up their sons who are abusive of their partners or the grandchildren. In some of the worst cases, the paternal grandparents have acted to circumvent the courts' denial of visitation to highly dangerous sons. In other cases, both parents, knowing of the abusiveness of one or both grandparents and anxious to protect their children, have opposed the visitation. Because many courts still view grandparent visitation favorably and because child abuse (and especially sexual abuse) claims are very difficult to prove … and mental health professionals are often afraid or unwilling to report them (American Psychological Association, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family 12 (Washington, DC 1996)), many parents' efforts to protect their children from abusive grandparents are unsuccessful." Zorza, J. "*PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes*," Domestic Violence Report, Vol. 4 No. 4 , p. 61-62 (April/May 1999).

Battered women and their children will be faced with increasing burdens as the potential for competing adults increases, with competing petitions from maternal and paternal grandparents, divorced grandparents, aunts, uncles, or other interested adults. Such litigation could continue throughout a child's minority. See Zorza, Id. at 62(discussion of effect on battered women of increased number of litigants and loss of confidentiality).

Best interests tests allow for insertion of the subjective value judgments of the trier of fact by emphasizing judicial discretion. The tests, by definition, do not limit consideration to more objective fitness standards. As such, it flies in the face of the Constitutional protections of the natural parent-child relationship discussed above. The effects of third-person intervention are even more burdensome for low-income women

and survivors of domestic violence who are seldom in a position to defend their family autonomy in protracted litigation.

CONCLUSION

The fundamental and compelling State interest is to ensure that children are in fit environments, including freedom from abuse and neglect, and receiving adequate food, shelter, clothing, and access to education. The welfare of children would be dramatically improved if the state were to satisfy this duty. However, the State has far to go in guaranteeing this minimal standard. Third parties have avenues of relief for addressing fitness issues through state juvenile and probate laws, including abuse and neglect proceedings, guardianships and other mechanisms. The State has no compelling interest, however, in realigning families based on subjective and individualized judgments about family make-up.

Allowing standing for grandparents as against the rights of fit parents and children would create widely divergent laws from jurisdiction to jurisdiction. The State cannot legislate the most private and fundamental of relationships – that between fit parents and children.

The decision of the Washington Supreme Court should stand.

Anne L. Argiroff
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December 9, 1999

ATTACHMENT – INDIVIDUAL STATEMENTS OF AMICI

Domestic Violence Project, Inc./SAFE House

The Domestic Violence Project Inc./SAFE House (DVP) is a not-for-profit agency incorporated in the State of Michigan. Our mission is to end domestic violence in Washtenaw County, by providing emergency assistance, support and advocacy to victims of domestic violence including children and by aggressively promoting community and systems change.

DVP was directly involved in the introduction and passage of Michigan Public Act 25, 1993, which added domestic violence as a factor that must be considered by the court in determining the "best interest of the child" in child custody cases. Domestic violence, regardless of whether the violence was directed against or witnessed by a child, is a form of abuse, and must be considered contrary to the best interest of a child, and a detriment to their relationship between the child and the perpetrator of the violence.

Exposing children to violence of one parent against another parent is one of the most severe forms of psychological abuse that can occur. There are serious behavioral and emotional consequences suffered by children who live with a batterer. Parental separation does not end the trauma to children. Without intensive, specialized intervention, an individual who is abusive in one relationship will use violence in subsequent relationships, thus subjecting the children to witnessing further abuse.

Physical and emotional abuse usually increases after a victim leaves an abusive relationship. Batterers often use the court system, particularly through child custody actions, to

continue their abuse and exert control. In addition to physical assaults and manipulation of children, batterers will often attack the victim's character and fitness as a parent. The retaliatory nature of these types of actions must not be overlooked.

The interest of DVP in this case revolves around how third-party intervention in a child custody or visitation case may endanger battered women and their children. Our experience is that many of parents of batterers will manipulate their court-ordered visitation to permit the assailant to see the kids and the increase the assailant's access to the survivor.

Pennsylvania Coalition Against Domestic Violence

The Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV) is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children. PCADV is a membership organization of 62 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For over twenty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PCADV is deeply concerned about the safety of victims of domestic violence and endorses the presumption that children should reside with the non-perpetrating parent where there is a history of domestic abuse. Victims of domestic violence who are parents often must leave their home with their children and are in a temporary state of transition in order to secure their safety and the safety of their children. This period of transition can be misinterpreted as a lack of stability. Opening the door for third parties, including grandparents, to file for custody during this critical but necessary time of transition may deter victims of domestic violence from leaving a violent home. The best interest of the child, in this situation, must be to maintain the safety and the security of their home. Allowing grandparents to file for custody will deteriorate the child's sense of security. The best interest of the child in these situations includes maintenance of a stable environment to the greatest extent possible. Maintaining residence with their parent is of the utmost importance during this critical time.

PCADV strongly urges the Supreme Court of the United States to limit third party intervention in child custody cases especially where domestic violence is involved.

Florida Coalition Against Domestic Violence

The Florida Coalition Against Domestic Violence (FCADV) is a not-for-profit agency incorporated in the State of Florida for purposes of providing services and advocacy on behalf of survivors of domestic violence and their children.

FCADV is deeply concerned about the safety of survivors of domestic violence and their minor children as they seek to secure their safety away the perpetrator of the violence. In many cases, the relatives of the assailant will assist in the assailant's continued efforts to exert control over the survivor and her children, often in protracted custody and visitation disputes.

The interest of the FCADV in this case is to seek to limit the intervention of third parties in child custody and visitation disputes, particularly where domestic violence is involved.

Iowa Coalition Against Domestic Violence

The Iowa Coalition Against Domestic Violence (ICADV) is a non-profit organization incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and also acts on a statewide level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. ICADV recognizes that unequal power contributes to violence against women. Therefore, ICADV advocates social change, legal and judicial reform, education, and the end to all oppression.

Missouri Coalition Against Domestic Violence

The Missouri Coalition Against Domestic Violence (MCADV), headquartered in Jefferson City, is the membership organization for the providers of domestic violence intervention and prevention services in the state of Missouri. The Coalition was incorporated as a not-for-profit corporation in the state of Missouri in 1980, and currently has seventy-seven (77) organizational members and numerous individual members from the allied professions. The interest of MCADV in this case revolves around how third-party intervention in child custody case may endanger battered women and their children. MCADV has participated as *amicus* in numerous cases of interest to battered women, including Mund V. Mund, No. SC81631 (Mo. Nov.9, 999).

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In The

Supreme Court of the United States

JENNIFER TROXEL, et vir,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF THE INSTITUTE FOR JUSTICE, ALABAMA FAMILY ALLIANCE, AND THE MINNESOTA FAMILY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The Institute for Justice is a nonprofit, public interest legal center committed to defending the essential foundations of a free society and securing greater protection for individual liberty. The Institute has a particular interest in securing the natural rights and liberties of citizens, including the right of parents to direct the upbringing and education of their children. Among the issues we have litigated in this area are parental school choice and mandatory community service as a condition of public high school graduation.

The Alabama Family Alliance, incorporated in 1989, is the largest independent nonprofit research and education organization in Alabama focusing on state and national public policy issues affecting the family. The Alabama Family Alliance is dedicated to defending and promoting the ideals of free markets, limited government, and strong families that are indispensable to the preservation of a free and prosperous society. The mission of the Alliance is to enter the public square of policy development with innovative ideas and fact-based, objective analysis of issues in the areas of the family, economics, education, health care, the environment, government, and the culture.

The Minnesota Family Institute is a nonprofit, education research organization that promotes policies and initiatives that strengthen families. The Institute seeks to

help families by strengthening marriages and promoting parental rights and religious liberties throughout society.[1]

BRIEF SUMMARY OF THE FACTS

A Washington State statute, RCW 26.10.160(3), allows any person, at any time, to petition for visitation rights with children without regard to the relationship to the child, without regard to changed circumstances, and without regard to harm. Visitation rights are to be granted, pursuant to the statute, if it is in the "best interests" of the child. *In re Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21 (Wash. 1998).

The Supreme Court of Washington reviewed this statute in the petitions of several different parties. Only one case is currently before this Court. It involves a petition filed by grandparents to obtain visitation rights. The facts are tragic. (The factual summary below is drawn from the majority opinion in *Custody of Smith*.)

Natalie and Isabelle Troxel are the daughters of Brad Troxel and Tommie Granville, who never married. After their separation, Brad lived with his parents, Jennifer and Gary Troxel, and the girls visited their father at their grandparents' home on occasion. Brad committed suicide

[1] In conformity with Supreme Court Rule 37, the *amici* have obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. The *amici* also state that counsel for a party did not author this brief in whole or in part; and no person or entities other than *amici*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

in May 1993. At first, the girls continued to visit the Troxels regularly, but their mother decided to limit visitation. In December 1993, the Troxels filed a petition pursuant to the above-referenced statutory provision to obtain visitation rights with their grandchildren. In 1995, the trial court entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on each of the Troxels' birthdays. Granville (the mother) appealed, during which time she married again. Her husband adopted the girls in February 1996.

The Washington Court of Appeals subsequently reversed the visitation order and dismissed the grandparents' petition holding that nonparents lack standing to seek visitation unless a custody action is pending. The Supreme Court of Washington, looking to the plain meaning of the statute, held that the grandparents had standing. The statute clearly stated that "any person" could petition for visitation. Nevertheless, the court held that the statute violated the fundamental right of parents under the Fourteenth Amendment to direct the upbringing and education of their children.

In striking down the law, the Supreme Court of Washington held that U.S. Supreme Court precedents demanded that some harm must threaten the child before the government may constitutionally interfere with a parent's right to rear his or her own child. The court went on to note that the requirement of harm is the sole protection that parents have against pervasive state interference in parenting. The court further noted that there could be certain circumstances, such as when a child has enjoyed a substantial relationship with a third person, where

depriving the child of contact could cause severe harm. But the state statute at issue had no such requirement. Any person could petition for visitation rights, even absent a substantial relationship, and a court is empowered to grant visitation not under a harm standard, but under a "best interests of the child" standard. As the court held, "short of preventing harm to the child, the standard of 'best interests of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental right." *Custody of Smith*, 969 P.2d at 30.

This Court granted certiorari to review the question of whether Washington's statute violates the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The old maxim "Hard cases make bad law" holds with special force in this case. One can hardly avoid sympathizing with grandparents who are deprived of contact with their grandchildren. The focus must remain, however, on the challenged Washington State statute in this case and what it sanctions. Indeed, in this case, the *parent* is the victim of the State's overly sweeping intrusion into the sanctity of the family.

The statute occasions a wholesale transfer of power from parents to courts, allowing them to determine the most intimate of relationships – contact with children – on the basis of subjective criteria. The statute places the State in a position superior to the parents in determining a child's best interests. Our Constitution and this Court's

precedents protect the family from unwarranted governmental intrusion. Petitioners call upon this Court to repudiate jurisprudence that forms an essential cornerstone of our free society: the fundamental right of parents to direct the upbringing and education of their children. We call upon the Court to reaffirm and strengthen it.

ARGUMENT

I. SINCE *MEYER* AND *PIERCE* WERE DECIDED BEFORE THE MODERN TWO-TIER APPROACH TO ANALYZING CONSTITUTIONAL RIGHTS, THIS COURT SHOULD REAFFIRM PARENTAL LIBERTY AS A FUNDAMENTAL CONSTITUTIONAL RIGHT UNDER THE FOURTEENTH AMENDMENT.

The right of parents to direct and control the upbringing and education of their children – the right to "parental liberty" – is firmly established in our constitutional heritage and guaranteed by the Fourteenth Amendment to the U.S. Constitution. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 293 U.S. 284 (1927); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Carey v. Population Services*, 431 U.S. 678 (1977). As this Court emphatically stated in *Pierce*, 268 U.S. at 535, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high obligation, to recognize and prepare him for additional obligations."

In *Pierce*, this Court declared unconstitutional an Oregon law that compelled public school attendance and

prohibited any form of alternative education, noting that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children." *Id.* In *Meyer*, decided two years earlier, this Court held "unreasonable" and thus unconstitutional a Nebraska statute that prohibited the teaching of foreign languages to any child before the eighth grade.

Admittedly, some degree of uncertainty exists concerning the nature of parental liberty rights recognized in the *Meyer-Pierce* line of cases. As the First Circuit recently noted, "The *Meyer* and *Pierce* cases were decided well before the current 'right to privacy' jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those rights whose infringement merits heightened scrutiny." *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995); *Herndon v. Chapel Hill-Carrboro Cty. Bd. of Educ.*, 89 F.3d 174, 178 (4th Cir. 1996) (recognizing that this Court has not addressed Fourteenth Amendment parental liberty rights "standing alone" for decades, thus leading to some ambiguity in the law and conflicts in federal and state courts); *see also Blackwelder v. Safnauer*, 689 F. Supp. 106, 136 (N.D.N.Y. 1988) ("the degree of judicial scrutiny to be applied to a governmental action that interferes with the privacy interests recognized in *Pierce* and *Meyer* . . . is not clear to this court").

Some courts and several of the *amici* in this case latch onto the "reasonableness" language in *Meyer* and *Pierce* and argue that these cases stand for the proposition that parental rights are non-fundamental and therefore that

laws restricting such rights are subject only to rational basis review. *See, e.g., Michigan v. Bennett*, 501 N.W.2d 106 (Mich. 1993) (finding the right to direct the education of children to be a non-fundamental right); Brief of Nat'l Conf. of State Legislatures, *et al.* at 12-14. These contentions are incorrect. While *Meyer* and *Pierce* use the language of reasonableness, both were decided over a decade before this Court established its current standard of review in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (setting forth modern fundamental rights/strict scrutiny review and non-fundamental rights/rational basis review).

Rather, the cases stand for the proposition that governmental bodies "may not pursue legitimate educational ends by means whose primary effect is to override the reasonable educational choices of parents." Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 1006 (1996); *see also Farrington*, 273 U.S. at 298 (striking down state regulation of supplemental foreign-language schools that denied parents "reasonable choice and discretion in respect to teachers, curriculum and textbooks"). In other words, under pre-*Carolene Products* jurisprudence, the issue in the *Meyer-Pierce* line of cases was decidedly not whether the state requirements were "reasonable," but whether the requirements "*unreasonably* interfered with the *rights of parents* under the Fourteenth Amendment." See *Pierce*, 238 U.S. at 534 (emphasis added).

Petitioners and *Amici Curiae* National Conference of State Legislatures, *et al.* contend that Fourteenth Amendment parental liberty rights are only recognized as fundamental if combined with First Amendment rights and

that this Court's decision in *Pierce* was primarily about the right of parents to direct the religious upbringing of their children. See Petitioners' Brief at 25-36; Brief of Nat'l Conf. of State Legislatures' at 9-10. It is quite clear, however, that *Meyer* and *Pierce* stand for a proposition far broader than this. These cases rested exclusively on Fourteenth Amendment grounds and did not involve religious objections to state requirements. In *Pierce*, for instance, one of the two parties challenging Oregon's public school attendance requirement was a secular military academy. The Court did not in any way distinguish between the right of Oregon parents to send their children to a Catholic school, which was another party to the case, or to the secular private school in question. Rather, the Court merely stated that compelled public school attendance "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of their children." *Pierce*, 268 U.S. at 509-10.

Both petitioners and National Conference of State Legislatures, *et al.* distort passages from *Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) in an attempt to unduly narrow the holding of *Pierce*. The right to send one's child to a religious school is undoubtedly an important component of the right to select a private education for one's child, and it is quite understandable why this Court identified that aspect of the *Pierce* holding in *Prince* and *Yoder*, both of which involved religious objections to infringements of parental liberty. Nothing in either of these cases, however, suggests that this Court meant to retroactively restrict its *Pierce* holding to First Amendment grounds.

Indeed, guaranteeing the right of parents to select a religious school while denying parents the right to send their children to a secular private school would stand in much tension with this Court's current jurisprudence of neutrality in free exercise and establishment clause matters. *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

Although *Meyer* and *Pierce* set forth a clear presumption in favor of parental rights over state interference, it is important to examine whether parental liberty rights should be recognized as fundamental under the current standards of this Court. As the following sections make clear, Fourteenth Amendment parental liberty rights fall squarely within the recognized traditions, laws and background principles of the Constitution, thereby necessitating recognition as fundamental rights.

II. THE COMMON LAW AND OUR NATION'S HISTORY AND TRADITIONS SUPPORT RECOGNIZING PARENTAL LIBERTY AS A FUNDAMENTAL RIGHT.

The precise right at issue in this case must be clarified at the outset. The right is not, as petitioners contend, "a parent's asserted prerogative to prevent a child from visiting with his or her grandparents." *See* Petitioners' Brief at 30. Rather, the right at stake is "the interest of a parent in the companionship, care, custody, and management of his or her children," and what level of scrutiny laws that interfere with that right should receive. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Parental rights, recognized under the due process clause of the Fourteenth Amendment, are admittedly not in the text of that amendment or in the Constitution. And while the recognition of non-textual constitutional rights is a controversial area, all members of this Court agree that such rights exist. *See Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 848-49, 951-52, 981 (1992) (plurality and dissenting opinions). The essential disagreement is whether a claimed right is consistent with, or antagonistic to, the recognized traditions, laws, and background principles underlying the Constitution and our republic as a whole. *See Bowers v. Hardwick*, 478 U.S. 186, 192-95 (1985). As discussed below, the background principles of common law, our nation's traditions, and the long-standing decisions of this Court indicate that parental rights, though non-textual, must be recognized as fundamental and, moreover, are encumbered with none of the difficulties that leave others highly controversial.[2]

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[2] We believe that the Ninth and Fourteenth Amendments to the United States Constitution reflect the natural rights orientation of the amendments' drafters and the common law traditions present at the time of their passage. *See* Corwin, *The "Higher Law" Background of American Constitutional Law* (1955); Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 Const. Commentary 93 (1995). These amendments were intended not to create new rights, but rather to protect pre-existing rights from state interference. In our view, the Privileges or Immunities Clause of the Fourteenth Amendment and the Ninth Amendment, rather than the Due Process Clause, should be the primary sources for the recognition of substantive, albeit non-textual, individual rights. *See, e.g.*, Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y (1989); Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989); Shankman & Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, Cato Policy Analysis No. 326 (November 23, 1998). Of course, the Privileges or Immunities Clause was largely read out of the Constitution in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1871), thus encouraging the creation of "substantive due process" rights. Whether it is too late in the day to reconsider *Slaughter-House* is a matter of great debate among legal scholars and even some members of this Court. *See* Kurland, *The Privileges or Immunities Clause "Its Hour Come Round at Last"?*, 1972 Wash. U. L. Q. 405; Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* (1990); *Saenz v. Roe*, 119 S.Ct. 1518 (1999). We believe firmly that *Slaughter-House* should be reconsidered by the Court and that the Privileges or Immunities Clause should be restored to its rightful place as the protector of basic individual rights. Nevertheless, the right of parents to direct the upbringing and education of their children, as the following sections make clear, is deeply embedded in our Nation's history and traditions and should be recognized as fundamental under either the Due Process or the Privileges or Immunities Clauses of the Fourteenth Amendment.

One of the most widely acknowledged and well-established rights at common law and at the founding of this country was the right of parents to have primary responsibility for the upbringing and education of their children. Family law scholar Bruce C. Hafen states that "[t]he common law has long recognized parental rights as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental assumption about the family as a basic social, economic, and political unit." Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 606, 615; Locke, *An Essay*

Concerning the True Original Extent and End of Civil Government, ¶¶ 67, 69 (Great Books ed. 1991) (noting that parents may employ teachers but ultimate authority over children lies with parents).

Innumerable state cases reflect the understanding that parental rights were sacrosanct in both English and early American law. See, *e.g.*, *Rulison v. Post*, 79 Ill. 567, 573 (1875) ("Law givers in all free countries . . . have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. That is, and ever has been, the spirit of our free institutions."); *Matarese v. Matarese*, 47 R.I. 131, 132-33, 131 A.198, 199 (1925) ("Immerorially the family has been an important element of our civil society, one of the supports upon which our civilization has developed. . . . These fundamental principles are traceable to ancient customs and usages and are fixed by tradition and evidenced by decisions of the courts.") These decisions reflect the understanding that parental liberty is a natural right, which, like other such rights, predates the founding of the state.[3]

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[3] Common law parental liberty rights extended not only to the care and nurture of children, but also to their education as well. *See, e.g., In re Guardianship of Faust*, 239 Miss. 299, 305-07, 123 So. 2d 218, 220-21 (1960) ("The kind and extent of education, moral and intellectual, to be given a child and the mode of furnishing it are left largely to the discretion of parents. . . . [T]his important parental right is protected by common law principles."). Moreover, these rights were modified but not extinguished with the enactment of compulsory school attendance laws. *See, e.g.*, Moskowitz, *Parental Rights and State Education*, 50 Wash. L. Rev. 623, 636-43 (1975); Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's*

Early common law traditions and cases recognizing and enforcing the right of parents to direct their children's upbringing and education were the basis for the landmark *Meyer* and *Pierce* decisions. *See* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Societal Interests*, 81 Mich. L. Rev. 473, 572 (1983) ("when the Court in 1923 first recognized that the right of parents to direct the upbringing of their children was part of the substantive liberty protected by the due process clause, it did not create a new legal right out of whole cloth. It merely acknowledged in constitutional language the traditions . . . that predated the Constitution"); *see also* Hirschoff at 897. More recently, Justice Kennedy noted that the history of the common law, Western civilization, and American traditions signal an understanding that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Hodgson v. Minnesota*, 497 U.S. 417, 484 (Kennedy, J., concurring in part and dissenting in part) (1990) (quoting *Prince*, 321 U.S. at 166).[4]

Child Excused From Objectionable Instruction?, 50 Southern Cal. L. Rev. 871, 886-97 (1977); *School Board v. Thompson*, 103 P. 578 (Okla. 1909); *Hardwick v. Board of School Trustees*, 205 P. 49 (Cal. App. 1921).

[4] Justice Kennedy further noted in *Hodgson*, *id.* at 483, that while the common law traditionally vested primary parental authority with the father, "the common law of most States has abandoned the idea that parental rights are vested solely in fathers, with mothers being viewed merely as agents of their husbands; it is now the case that each parent has parental rights and responsibilities."

As set forth previously, the Due Process Clause of the Constitution guarantees those liberties "traditionally protected by our society" and those " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)). In addition to being recognized at common law, parental liberty is worthy of fundamental status because it represents protection of an institution of the utmost importance to our society: the family. As this Court has stated, "the sanctity of the family . . . is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977); *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979) (Powell, J.) ("While we do not pretend any special wisdom on [childrearing], we cannot ignore that . . . deeply rooted in our Nation's history and tradition is the belief that the parental role implies a substantial measure of authority over one's children.")

Recognizing parental authority over children is not in any way contrary to the important American principle of individualism. Indeed, the central role of parents in the upbringing of children protects the family from undue governmental interference in the preparation of children to be free and responsible adults:

> No assumption more deeply underlies our society than the assumption that it is the individual [parent] who decides whether to raise a family, and, in broad measure, what values and beliefs

> to inculcate in the children who will later exercise the rights and responsibilities of citizens and heads of families. . . . The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.

Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 Boston U. L. Rev. 765, 772-73 (1973); *Hodgson*, 497 U.S. at 444-45 n.31 (Stevens, J.) ("Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.") In sum, under our legal traditions, parents are the rightful incubators of moral values and standards and, absent some demonstration of harm to children, government may not intrude into the sanctity of the family.

III. RECENT DECISIONS BY THIS COURT UNDERSCORE THE CENTRALITY OF PARENTAL LIBERTY TO OUR NATION'S HISTORY AND TRADITIONS.

Parental liberty rights have a rich constitutional pedigree, and a firm foundation exists in the law for acknowledging such rights as fundamental. As mentioned previously, despite the lack of recent cases addressing this issue specifically, earlier decisions of this Court have established parental liberty as "essential to the orderly pursuit of happiness by free men," *Meyer*, 262 U.S. at 399, and a basic value "implicit in the concept of

ordered liberty," thus meriting recognition of fundamental status. *See Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

Moreover, this Court has consistently incorporated parental liberty rights – and *Meyer* and *Pierce* – into decisions involving fundamental privacy rights recognized under the Fourteenth Amendment. *See, e.g., Griswold*, 381 U.S. at 483 (incorporating "the principle of *Meyer* and *Pierce*"); *Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (childrearing is "basic in the structure of our society"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that family rights and childrearing are fundamental rights); *Kelly v. Johnson*, 425 U.S. 238, 244 (1976) (equating *Meyer* parental liberty rights to those rights recognized in *Roe* and *Griswold*); *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 881 (1990) (equating "right of parents . . . to direct the education of their children" with "freedom of speech and of the press"); *Casey*, 505 U.S. at 848 (1992) (most recent affirmation of parental liberty rights and *Meyer* and *Pierce*).

In *Casey*, 505 U.S. at 851, this Court held that within the sphere of protected individual liberties are "personal decisions relating to marriage, . . . , family relationships, child rearing, and education." Lower courts' cavalier dismissal of parental liberty as a non-fundamental right flies in the face of *Casey*'s pronouncement concerning the fundamental nature of parental rights as they relate to childrearing and education.[5]

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[5] Indeed, the plurality in *Casey* identified a central rationale for the doctrine of *stare decisis*: "the concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.*, 505 U.S. at 854. To reduce state interference with parental rights to *de minimus* "rational basis" review would not constitute an exercise in judicial restraint. Rather, it would upset a basic liberty cherished by Americans and their forebears for centuries.

Accordingly, the right of parents to direct the upbringing and education of their children should likewise be affirmed as fundamental, and violations of this right should be subject to strict scrutiny. If this Court is unwilling to apply strict scrutiny, the respect accorded by this Court and others to parental rights, the traditions of this Nation, and the background principles of common law justify at least heightened or intermediate scrutiny. As discussed *infra*, adoption of rational basis review would make laws and regulations that intrude into the family realm virtually unreviewable and entirely undermine the ability of parents to direct their children's upbringing and education.

IV. RATIONAL BASIS REVIEW WILL LEAVE PARENTAL LIBERTY VIRTUALLY UNPROTECTED AND SANCTION UNPRECEDENTED, SERIOUS INTRUSIONS BY GOVERNMENT INTO THE FAMILY REALM.

Classification of Fourteenth Amendment parental liberty rights as non-fundamental and adoption of rational basis review for parental liberty claims would allow parents little recourse when faced with intrusive laws or regulations. Under rational basis review, a law must be upheld "if there is any reasonably conceivable state of

facts that could provide a rational basis" for the law. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). In reality, such review "is tantamount to no review at all." *Id.* at 323 n.3 (Stevens, J., concurring); *see also* Nowak & Rotunda, *Constitutional Law* §§ 11.4, 14.3 (1991) (discussing extremely lax rational basis review standard). Indeed, even the extreme requirements struck down in *Meyer* and *Pierce* – prohibitions on foreign language instruction and private education – were justified on the basis of furthering such valid educational purposes as promoting good citizenship values, and most likely would have been upheld if subject to modern rational basis review.[6] *See Meyer*, 262 U.S. at 398; *Pierce*, 268 U.S. at 517.

Petitioners and their *amici* attempt to raise the specter of constant court interference with the decision of state courts and governmental bodies in the field of domestic relations law if this Court recognizes Fourteenth Amendment parental liberty rights as fundamental. In fact, the parties have it exactly backward. A finding that parental liberty is a non-fundamental right and a reversal of the court below would sanction broad and serious intrusions by governmental bodies and courts into the family realm. The invalidated Washington statute is the true example of "judicial activism," empowering judges to second guess parental judgments under the pretext of promoting the "best interests" of children. In contrast, the position of the Supreme Court of Washington provides a bright line

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[6] That fact further undermines petitioners' argument that the Court in *Meyer* and *Pierce* used rational basis scrutiny in the pre-rational basis era.

that properly balances the state's interest in protecting children with parental prerogatives: "[S]ome harm [must] threaten[ ] the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her own child. . . . '[T]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.' " *Custody of Smith*, 969 P.2d at 29, 30 (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn.1993)).

Moreover, the slippery slope argument advanced by petitioners in this regard is wildly overblown. They assert, for instance, that affirming the Supreme Court of Washington's opinion would "constitutionalize" every custody and visitation case in the country. See Petitioners' Brief at 27. This litigation, however, importantly involves a dispute between a parent and non-parents. It is clear, therefore, that only one party possesses some degree of parental rights with respect to the child in question. Custody and visitation disputes between two parents, each of whom possess parental rights, present an entirely different type of conflict. Both parties have Fourteenth Amendment parental liberty rights and stand on the same level for constitutional purposes. It is therefore the job of courts to resolve such custody and visitation disputes pursuant to the well-developed body of family law jurisprudence existing in each of the fifty states.

The approach of the Supreme Court of Washington to the instant matter is entirely consistent with the common law traditions and precedents discussed previously. Under those traditions, children are under the care and custody of their rightful parents, until such time that the parents interfere with – i.e. harm – the child's health or

safety. At that point, the state has a compelling interest to intrude into family arrangements.

In attempting to justify its approach to parental rights, petitioners also invoke *Casey* and its emphasis on the magnitude of impact of a governmental action on a constitutional right. Petitioners' Brief at 22-23. Petitioners' line of analysis, however, would undoubtedly lead this Court to provide insufficient protection to parental liberty. Under petitioners' theory, parents have some degree of freedom to control the upbringing of their children in those areas that implicate vital aspects of the parent-child relationship. This test, however, places the government in the untenable position of determining the relative importance of various aspects of childrearing. Reasonable people can disagree as to those things that most affect a child's development, and it is crucial to the protection of parental liberty that individual parents, and not the government, be allowed to assess what matters are important to the upbringing of their children and to control the decisions that are made in those realms, subject to restrictions which pass strict scrutiny.

Moreover, this Court's decision in *Casey* actually supports the Supreme Court of Washington's judgment in the instant matter. The central feature of the majority opinion in *Casey* was the "constitutional doctrine that where reasonable people disagree the government can adopt one position or the other . . . assumes a state of affairs in which the choice does not intrude on a protected liberty." *Casey*, 505 U.S. at 851. Accordingly, the government must not coerce choices within spheres of protected liberty if reasonable people could disagree with those choices. Certainly, reasonable people could disagree with whether

grandparents in this particular case or other third parties in another case should have access to children. However, these choices, as *Casey* acknowledges, take place in spheres of protected liberty, personal decisions relating to "marriage, . . . , family relationships, child rearing, and education." *See Casey*, 505 U.S. at 851; see also Gilles, 63 U. Chi. L. Rev. at 1003-04. Therefore, under *Casey*, the government may not interfere within the protected spheres of "family relationships" and "childrearing," absent some showing of harm.

In the area of childrearing and family arrangements, our Nation's history and traditions are premised on the idea that parents, not the government, will do what is in the "best interests" of their children. Parents, to be sure, may not always make the best decisions, but as the Supreme Court of Washington noted, "it is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." *Custody of Smith*, 969 P.2d at 31. A determination by this Court that parental prerogatives and choices should be set aside in the name of the "best interests" of the children or because Washington's law had a "reasonable relationship" to valid state interests will sanction unprecedented intrusions by government into the family realm. That outcome is diametrically opposed to both the decisions of this Court and our Nation's recognition of the primary role of parents in the upbringing and education of children.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the decision of the Supreme Court of Washington, and, in doing so, recognize Fourteenth Amendment parental liberty rights as fundamental.

Respectfully submitted,

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In The

Supreme Court of the United States

JENIFER TROXEL, et vir.,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Washington

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae Christian Legal Society is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors. *Amicus curiae* National Association of Evangelicals is a nonprofit association of Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people.

Both *amici* have worked for over two decades to protect citizens' right to religious belief and practice. The protection of the right of parents to direct the upbringing of their children without State interference – the core issue in this case – is a vital component of the protection of individual liberty (including, but not limited to, religious liberty) for all citizens.

A more detailed statement of interest of the *amici* is set forth in the Appendix to this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

---

[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *See* S. Ct. Rule 37.6. *Amicus* Christian Legal Society received a grant from the Alliance Defense Fund to cover its expenses in producing the brief. The Alliance Defense Fund is a 501(c)(3) organization headquartered at 7819 East Greenway Road, Suite 8, Scottsdale, Arizona 85260. The Alliance Defense Fund exercised no control over the content of the brief.

STATEMENT OF THE CASE

The most important fact about this case is that it is *not* about "grandparents' rights"[2] or about the constitutionality of grandparent-visitation statutes in general. Instead, this case is about one State's extraordinarily broad third-party visitation laws, laws which, as interpreted by that State's highest court, seriously undermine family autonomy and parents' fundamental rights. Thus, the policy and prudential arguments that the Petitioners and their *amici* have advanced in favor of grandparent-visitation statutes (*see* Pet. Br. 8-18), do *nothing* to call into question the correctness of the decision below or to rehabilitate the unconstitutionally invasive nature of the specific statutes at issue.

Washington law purports to permit "any person" – not just grandparents or other family members – to ask a court "at any time" for the right to visit – and therefore to influence – someone else's child. Visitation rights may be granted to "any person" – presumably over the child's parents' objection – so long as the court believes visitation is in the "best interests" of the child. No prior finding of parental neglect, abuse, or incompetence, nor any showing of harm to the child, is required. The person seeking visitation need not establish any substantial relationship with the child. The court is not required to consider the parents' reasons for their decision to limit or

[2] The Petitioners now concede as much. *See, e.g.*, Brief for Petitioners (hereinafter "Pet. Br."), at 18 ("The petitioners are not advancing an argument that grandparents have a constitutional right to visit their grandchildren.").

deny access to their children.[3] In short, *any person* simply may ask a court to second-guess parents' decisions – and thereby impose on parents the cost of defending those decisions – about what influences are in the "best interests" of their children. *See* Revised Code of Washington § 26.10.160(3), § 26.09.240 (amended 1996); *see also* Pet. App. 5a-12a, 21a-22a (describing and analyzing the statutes).

The reach and intrusiveness of these statutes is so striking that the Washington Court of Appeals believed the laws could not possibly mean what they say. *See In re Visitation of Troxel*, 87 Wash. App. 131, 940 P.2d 698 (Wash. Ct. App. 1997). After observing that the statutes purport to confer on "any person" the right to petition for visitation, the Court of Appeals insisted that:

> A literal reading of this statute could lead to the sort of absurd result that our canons of statutory construction forbid. Does "any person" have standing to petition "at any time" for visitation with a child? For example, could a member of the state Legislature who has displeased a constituent find herself faced with the considerable expenditure of time, money, and emotional energy to oppose a wholly frivolous petition by that constituent? Should this occur without any showing that the parent was unfit or that the family was unstable or that the child was otherwise facing any threat to its well-being? Our

[3] Washington law does provide courts with a list of factors they "may" consider in determining whether third-party visitation is in the child's "best interests," but these factors do not, of course, preclude "any person" from seeking visitation and imposing the burdens of litigation on parents. *See* Appendix to the Petition for a Writ of Certiorari (hereinafter "Pet. App."), at 27a (reprinting RCW § 26.09.240 (as amended 1996)).

> Legislature could not have intended such an absurd and potentially pernicious result from so broad a reading of the statute.

Pet. App. 58a. The Petitioners, in similar fashion, attempt to assure this Court that the Washington statutes do not *really* mean what they say[4] and wholly ignore their atypical overbreadth.

But these statutes – "absurd" or not – *do* mean what they say, the Supreme Court of Washington held, after reviewing their text and history in detail. Pet. App. 6a-13a. That court insisted that "[w]hile the statute as written may have potentially troubling consequences for stable families, this does not justify [the] Court of Appeals rewriting of the statute" (Pet. App. 12a), and that "we will not read qualifications into the statute which are not there." Pet. App. 11a.

This Court should likewise reject the Petitioners' efforts to frame this case as a referendum on the "constitutionality of grandparent visitation statutes" (*see* Petition for a Writ of Certiorari (hereinafter "Pet."), at 11) and to distract this Court's attention from the ambitious reach of the laws actually at issue. As it happens, the Petitioners in this case *are* grandparents.[5] We are aware of no reason

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[4] *See* Pet. Br. 10 ("In some instances, . . . the states simply provided that any person could make such a request. Legislation framed in this manner was not intended to authorize visitation suits by total strangers; so far as we have been able to ascertain, total strangers have not been awarded, or even requested, visitation under these laws.")

[5] Jenifer and Gary Troxel's son Brad was Natalie and Isabelle's father. He committed suicide in 1993. The children's mother – respondent Tommie Granville – decided to limit the Troxels' access to the children soon after Brad's death. Ms. Granville later married Mr. Kelly Wynn, who adopted the children in February 1996. Pet. App. 2a-3a.

to question Jenifer and Gary Troxel's love for their grandchildren, Natalie and Isabelle, nor does the decision below contain any facts suggesting that contact with the Troxels would or would not be detrimental to their grandchildren. But that is not the point. The children's mother decided *not* to permit such conduct and "as between [parents and judges], the parents should be the ones to choose whether to expose their children to certain people or ideas." Pet. App. 22a.

The Supreme Court of Washington's decision that these statutes are unconstitutional "as written" (Pet. App. 1a) rests on three basic points – all of which are consonant with, and indeed are compelled by, this Court's precedents. *First*, parents have a fundamental right under the Fourteenth Amendment to "autonomy in child rearing decisions." Pet. App. 12a. *Second*, state interference with parents' rights is forbidden unless the "state can show that it has a compelling interest [in interfering] and such interference is narrowly drawn to meet only the compelling state interest involved." Pet. App. 15a. *Third*, "[s]hort of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights." Pet. App. 21a-22a.

Alleging conflicts with decisions interpreting other States' far more narrow and carefully drafted "grandparents' rights" statutes (Pet. 6-11), the Petitioners invited this Court to engage in social engineering, asking it to recognize that "it may be time to pay more attention to our children's state of mind than a parent's rights" and

stating that the "issue before this Court is whether there is also an equal penumbra of responsibilities by parents to sustain loving and nurturing relationships between their children and third parties." *Id.* at 15. The Petitioners claim that the court below – a "conservative judiciary" – mistakenly "idealized the 'basic family unit' " which, they opine, is a "recent phenomenon of modern civilization." *Id.* at 11-12.[6] They state, "there has been a dramatic erosion of [this] 'stable basic family unit,' " and ask, "[a]re the courts and our society equipped to deal with modern life using the traditional view of the family?" *Id.* at 12-13. This Court granted certiorari. *Troxel v. Granville*, ___ U.S. ___, 120 S.Ct. 11 (Sept. 28, 1999) (No. 99-138).

SUMMARY OF THE ARGUMENT

Our argument that the decision below should be affirmed rests on a few basic points, *none* of which necessarily prejudices the case for a grandparent-visitation statute that is *narrowly tailored* to serve a *compelling state interest*.[7] *First*, the statutes at issue are *not* grandparent-

[6] Here and elsewhere, the Petitioners confuse the obvious fact that family structure has changed (although the "basic stable family unit" that the Petitioners deride has proved to be an inspiringly durable center-point *around which* these changes occur) with the entirely different point that, however organized, the family in general and parents in particular have been protected against unjustified *state intrusion* by the Constitution. The fact that families take many forms tells us nothing about whether the family should be subject to increased government oversight or third-party second-guessing.

[7] *See, e.g.*, Brief of the *Amicus Curiae* American Academy of Matrimonial Lawyers, at 7-9 ("[W]e urge this Court to declare

visitation statutes. Even if they were, the Petitioners and their *amici* have not pointed to any other visitation statutes that share the objectionable and unconstitutional features of Washington's particular statutes.[8]

Second, the Fourteenth Amendment's Due Process Clause – narrowly construed in light of history and tradition – protects the integrity and autonomy of the family from intrusive intervention by the State at third parties' request. Any State's law that, on its face, requires parents, at "any person's" request, to submit their decisions about who should have contact with and influence upon their children for judicial approval tramples on the "liberty" protected by the Fourteenth Amendment and is therefore, on its face, unconstitutional.

Third, because the Washington statutes infringe "fundamental rights" protected by the Due Process Clause, they must survive strict scrutiny. We urge this Court to once again[9] reject the "sliding scale" mode of substantive-due-process analysis proposed by the Petitioners (*see* Pet. Br. 22-24) and also to repudiate the suggestion that parents' rights to control and direct the upbringing of their children are somehow "second class" rights, rights less

the Washington third-party access statute unconstitutionally overbroad but preserve the question for a future case whether a carefully drawn third-party access statute would be constitutional.").

[8] It is, therefore, not true that "affirmance of the decision below would invalidate virtually all grandparent visitation statutes nationwide." Brief *Amicus Curiae* of AARP and Generations United In Support of Petitioners, at 17.

[9] *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720-722 (1997) (reaffirming traditional mode of due-process analysis and rejecting sliding-scale approach).

worthy of enthusiastic protection by the federal courts than other – perhaps more fashionable – freedoms, or rights that must ride piggy-back on some other constitutional claim in order to be vindicated. *See generally*, Pet. Br. 22-35.

Finally, we suggest an additional, complementary constitutional basis for affirming the decision below. In our view, not only do the broad statutes at issue unconstitutionally intrude on parents' rights and family autonomy, they unconstitutionally limit, censor, and co-opt the values that families communicate through their expressive association. *Of course*, the family is different in kind, and not merely in degree, from other voluntary associations. Still, parents communicate their values, to their children and to the world, through their child-rearing decisions – indeed, for many parents, this message is their most lasting and important statement – and this "speech," this "expressive association," is protected by the First Amendment.

* * *

This is no time to disregard or downgrade well established constitutional rights, nor is it the time to wade into the various controversies about the changing structure of the family. We respectfully urge the Court to affirm the decision below, to endorse its reasoning, and to reject the Petitioners' invitation to bring "up to date" fundamental constitutional rights through the statist imposition of new and sweeping "penumbra[l]" responsibilities. *See* Pet. 15-18.

ARGUMENT

I.

Parents Enjoy the Fundamental Right to Direct Their Children's Education and Upbringing, and to Decide Who and What Will Influence and Shape Their Children During Their Formative Years, Without Judicial Approval or Second-Guessing By the State.

It is a *fundamental* principle of constitutional law that, as the court below concluded, "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." Pet. App. 22a. The statist implications of the contrary view are staggeringly dangerous to the autonomy of the family and to democratic values. *Accord*, *In re Visitation of Troxel*, *supra* (Pet. App. 58a). The Petitioners argue that after centuries at a central place in Anglo-American legal tradition, the right of non-abusive parents to raise their own children as they see fit should yield to *ad hoc* judicial intervention at third parties' request. We disagree.

A. Our Nation's History and Tradition, Not the Policy Preferences of Judges or Popular Majorities and Not Novel Sociological Theories, Inform and Constrain This Court's Interpretation and Exposition of the Due Process Clause.

It is now settled that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests[.]" *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997); *see also Michael H. v. Gerald D.*, 491

U.S. 110, 121 (1989) ("It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint."). These "fundamental" rights are limited to those that are deeply rooted and firmly anchored in our Nation's history, tradition, and practice. *Glucksberg*, 521 U.S. at 710; *see also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (The Due Process Clause protects only those rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality op.) (The fundamental rights protected by the Fourteenth Amendment are those that are "deeply rooted in this Nation's history and tradition.").

This Court has often warned, however, of the danger that protecting fundamental rights not specifically mentioned in the Constitution might tempt judges to substitute their own subjective commitments or the prevailing preferences of vocal interest groups for clearly established traditions. *See, e.g., Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (The Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."). Given this danger, "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking,' [*Collins*, 503 U.S. at 125], that direct and restrain [the Court's] exposition of the Due Process Clause." *Glucksberg*, 521 U.S. at 721.

The Supreme Court of Washington's decision was consistent with, and is an instructive example of, the careful analysis that this Court requires in "substantive due process" cases. *See* Pet. App. 12a-15a. It did not

create any novel or previously unappreciated fundamental constitutional rights, nor did it purport to "update" our society's morality or family policies. Similarly, we do not ask this Court to expand the boundaries of Fourteenth Amendment "liberty" or to evaluate, endorse, or reject societal and demographic trends. We are mindful of this Court's warning that "[t]he doctrine of judicial self-restraint requires [this Court] to exercise the utmost care whenever [it is] asked to break new ground in this field." *Collins*, 503 U.S. at 125. We believe *both* that this Court should continue to adhere to the restrained mode of analysis outlined in *Glucksberg, supra, and* that this Court should affirm the decision and reasoning of the decision below, specifically, the controlling principle that the Fourteenth Amendment protects parents' fundamental right to control and direct the upbringing of their children.

B. This Court Has Held, and Should Reaffirm, That Parents Enjoy the Fundamental, Constitutionally Protected Right to Direct the Upbringing and Education of Their Children.

The family is the building block of civil society and the seed-bed of good citizenship. Our constitutional tradition has therefore respected its autonomy and integrity. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with [this Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that . . . decisions have respected the private realm of family life which the state cannot enter."). A long line of this Court's decisions confirm that

parents' rights sit at the very heart of the "liberty" protected by the Fourteenth Amendment.[10] As this Court observed in *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citations omitted):

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations". . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. BLACKSTONE, COMMENTARIES 447; 2 J. KENT, COMMENTARIES ON AMERICAN LAW 190.

These rights are not recent innovations, but instead reflect protections deeply rooted in our history and tradition. As the Court stated in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972):

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of children. This

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[10] The Petitioners' observation that the Supreme Court of Washington erred because "[t]here is no well established legal tradition of refusing such visitation" (Pet. Br. 7) reverses the burden. There *is* a well established tradition of leaving the decisions about visitation and other child-rearing matters to parents.

> primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Parents' rights and family autonomy do not depend on or derive from positive law, but rather are "intrinsic human rights, as they have been understood in this Nation's history and tradition," *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977). This Court has protected the "sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503 (emphasis added). As one Court of Appeals stated recently:

> To say that the institution of the family is deeply rooted in this Nation's history and tradition . . . as the Supreme Court often has said . . . borders on understatement. The unitary family is the foundation of society. Through the intimate relationships of the family, our children are nurtured, tutored in the values and beliefs of society, and prepared for life. . . . Through these relationships, our children – indeed, we, as parents – are strengthened, fulfilled and sustained. The bonds between parent and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons.

Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994) (Virginia's emergency-removal statute did not violate parents' due-process rights) (citations and quotation marks omitted).

Contrary to the Petitioners' suggestion, parents' rights are not anachronistic relics, nor is the protection of

family autonomy somehow "conservative"[11] or backward-looking. That the parents play the primary role in childrearing and educating is true not just as a matter of Anglo-American tradition and constitutional law. There is universal recognition of the fact that "parents seem naturally inclined to love and care for their children." Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 Univ. Chi. L. Rev. 937, 953 (1996);[12] *see also Parham*, 442 U.S. at 602 (The concept of the "family as a unit with broad parental authority over minor children" is rooted in the recognition that the "natural bonds of affection lead parents to act in the best interests of their children"); *Smith*, 431 U.S. at 844 (right to family integrity reflects "the emotional attachments that derive from the intimacy of daily association"). Moreover, it simply cannot be disputed that, as a general matter, "parents are more likely to pursue the[ir] child's best interests as they define it than is the state to pursue the child's best interest as the

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[11] *See* Pet. 11-12, 13 ("A conservative judiciary has defined the traditional concept of a family. . . . The conservative judicial view of the 'basic stable family unit' . . . may even be unintentionally racial or socioeconomically based."). Relatedly, it is worth noting that the Petitioners appear to have abandoned their earlier suggestion that the place of the "basic stable family unit" in our legal and social traditions is somehow racist. *See* Petition for Certiorari, at 13. Although the charge is untenable, it should be said that, in fact, poor families and ethnic minorities would seem particularly vulnerable to the intrusive meddling and governmental second-guessing, the unarticulated biases of upper-middle-class decisionmakers, and the burdensome costs of litigation that are authorized and invited by the statutes at issue.

[12] Prof. Gilles cites John Locke and "countless other observers" for this unremarkable yet fundamental premise. *See* Gilles, 63 U. Chi. L. Rev. at 953 n.59.

state defines it." Gilles, *supra*, at 940. Here, then, there is a happy consonance between universally observed facts and constitutional law.

Of course, no constitutional right – not even a "fundamental" liberty right – is absolute. *See, e.g., Prince*, 321 U.S. at 166 ("[T]he family itself is not beyond regulation in the public interest. . . . [The] rights of parenthood are [not] beyond limitation."). The Petitioners make much of this point, but they are tilting windmills. There are, obviously, situations where the States may and should intervene in family life to protect children and promote the common good. Parents, like everyone else, are subject to the host of general laws that States may enact pursuant to their police powers. *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972) ("The State's right – indeed, duty – to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here."). Vindication of the right at issue here need not invite – notwithstanding the Petitioners' "parade of horribles" (Pet. Br. 28-30) – an avalanche of nullification of reasonable health and welfare legislation.

While parents' rights are not absolute, it does not follow that they are meaningless, just as the fact that some parents' misuse their authority and neglect their responsibilities does not negate the existence and importance of rights or justify their abrogation. As this Court emphasized in *Parham:*

> That some parents may at times be acting against the interests of their children . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. . . . The statist notion

> that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

442 U.S. at 602-603 (citations and quotation marks omitted).

In short, the Washington statutes at issue are unconstitutional on their face *not* merely because they regulate parents' decisionmaking, but because they are a blunderbuss assault on family integrity and are not crafted with the precision required of laws that interfere with or infringe upon fundamental "liberty" rights.

C. Washington's Sweeping Third-Party Visitation Statutes Infringe Parents' Rights and Must Therefore Be Put to Strict Scrutiny.

Laws that infringe or intrude upon[13] fundamental liberties must survive strict scrutiny. *Glucksberg*, 521 U.S. at 721 ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.' " (quoting *Reno v. Flores*, 507 U.S. 292, 302

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[13] The Petitioners' discussion of cases where this Court did not apply strict scrutiny because the law in question did not " 'directly and substantially' " interfere with or " 'heavily burden' the fundamental rights of the family involved" (Pet. Br. 23-24) is inapposite because, as we discuss in more detail below, the Washington statutes authorize "any person" "at any time" to require a parent to litigate and justify his or her decisions limiting or denying visitation. The intrusive impact of the Washington laws is more than sufficient to trigger the strict scrutiny generally required in fundamental-rights cases.

(1993)). The court below was correct in proceeding from this premise. *See* Pet. App. 15a.

Still, the Petitioners and some of their *amici*[14] insist that strict and searching review of these intrusive statutes' effect on parents' rights is not required.[15] They in effect ask this Court to "downgrade" parents' rights – rights which have, again, been *repeatedly* recognized by this Court as "fundamental" – to a lesser breed of right, a "poor relation"[16] which must ride piggy-back on some *other* right in order to enjoy meaningful constitutional protection. *See, e.g.*, Brief of the National Conference of State Legislatures, *et al.*, as *Amici Curiae* in Support of Petitioners, at 8-12 ("Although the Court has recognized a parental liberty interest in bringing up children, the scope

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[14] Incredibly, some of the *amici* claim, as did the Petitioners below (*see* Pet. App. 17a), that the Washington third-party-visitation laws actually *pass* strict scrutiny.

[15] It is not clear whether the Petitioners and their *amici* believe this Court should employ a kind of balancing test or "undue burden" test in this case (*see* Pet. Br. 22-23); a hybrid-rights analysis, which would require parents' rights to be asserted in conjunction with *other*, supposedly more important, rights (*see* Pet. Br. 24-27); or the mere rational-basis review that is appropriate for social and economic legislation. *See* Pet. Br. 30-32; *see also* Brief of the National Conference of State Legislatures, *et al.*, as *Amici Curiae* in Support of Petitioners, at 16-18; Brief *Amici Curiae* of AARP and Generations United in Support of Petitioners, at 28-29 (urging reversal because "the protection of the welfare of children through grandparent visitation statutes is a rational means of addressing societal problems").

[16] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

of protection granted that interest depends upon the degree to which the State is impinging on some other constitutional right."). On this view, Washington's laws need only have a "reasonable relation to some purpose within the competency of the State." *Id.*, at 12 (citations and internal quotation marks omitted).

Alarmingly, many courts have in recent years embraced the "poor relation" theory of parents' rights and have de-commissioned them as "fundamental" rights.[17] In denigrating the constitutional pedigree of the

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[17] *See, e.g., Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir.), *cert. denied*, 519 U.S. 813 (1996) ("[W]here, as here, parents seek for secular reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the 'upbringing' of their child, rational basis review applies."); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996), *cert. denied*, 520 U.S. 1104 (1997) (stating that "rational basis review, not strict scrutiny," governs "wholly secular limitations on private school education"); *Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (concluding that because parents' "interest is not religious, . . . we must reject their position if the [challenged regulation] bear[s] some rational relationship to legitimate state purposes"); *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) ("We need not decide here whether the right to rear one's children is fundamental[.]"); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1456 (E.D. Mich. 1989) (rights recognized in *Pierce* and *Meyer* are not fundamental and do not require strict scrutiny); *Hanson v. Cushman*, 490 F. Supp. 109, 113-114 (W.D. Mich. 1980) (same); *but see Peterson v. Minidoka City Sch. Dist.*, 118 F.3d 1351, 1357-58 (9th Cir. 1997) (opinion of Noonan, J.) (applying heightened scrutiny to *Pierce* claim), *amended*, 132 F.3d 1258 (1997); *In re Care and Protection of Charles*, 399 Mass. 324, 334, 504 N.E.2d 592, 598 (1987) (*Pierce* makes it "clear that the liberty interests protected by the Fourteenth Amendment extend to activities involving child rearing and

"liberty" rights vindicated below, however, the Petitioners and their *amici* fly in the face of this Court's recent decision in *Glucksberg*, as well as the line of cases on which *Glucksberg* rests. *See Glucksberg*, 521 U.S. at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[ ] . . . to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)[.]").

This Court has rejected the notion of family integrity as a second-class right. Instead, the right to "raise one's children [has] been deemed 'essential,' . . . [one of the] 'basic civil rights of man,' . . . and [a right] 'far more precious than property rights[,].' " *Stanley v. Illinois*, 405

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education" and that parents "possess a basic right in directing the education of their children"); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750, 769 (1976) ("[T]he right of a parent to direct the education, religious or secular, of his or her children [is a] fundamental right guaranteed by the due process clause of the Fourteenth Amendment."); *Henne v. Wright*, 904 F.2d 1208, 1213 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991) (*Pierce* and *Meyer* rights are "fundamental," but not implicated in case involving state statute that restricted surnames); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 852 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1252 (1999) ("We are mindful that the Supreme Court has suggested in other contexts that parents may possess a fundamental right against undue, adverse interference by the state."); *Jordan v. Jackson*, 15 F.3d 333, 342-343 (4th Cir. 1994) (observing that "to say that the institution of the family is rooted in this Nation's history and tradition . . . borders on understatement[,]" that "the relationship between parent and child [is] inviolable except for the most compelling reasons," and that *Pierce* and *Meyer* rights are "essential" and "fundamental").

U.S. at 651 (internal citations omitted), and has been recognized as a "fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Meyer*, 262 U.S. at 401 ("That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain *fundamental rights which must be respected.*") (emphasis added). This is not the language of mere rational-basis review.

D. Washington's Expansive Third-Party Visitation Statutes Cannot Survive Strict Scrutiny.

Whatever important public interests might theoretically be served by other States' grandparent-visitation laws, the *particular* laws at issue here cannot fairly be described as "narrowly tailored to serve [a] compelling state interest," *Reno*, 507 U.S. at 302, and therefore cannot survive strict scrutiny. The court below was correct to reject the breathtakingly intrusive argument that "a judicially determined finding that visitation is in the best interests of the child is a sufficiently compelling justification to override a parent's opposition, regardless of the fact that the parent's fitness is not challenged or that there has been no showing of harm or threatened harm to the child." Pet. App. 17a. Instead, "the state may interfere only 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.' " Pet. App. 17a (quoting *Yoder*, 406 U.S. at 234). As the court below emphasized, "[t]he statutes at issue do not contemplate any . . . harm or potential harm to the child which must be prevented by third party visitation rights" (Pet. 20a); they "lack other safeguards to prevent stable families from defending in court against frivolous petitions for visitation" (Pet. App. 22a); they "do not require the petitioner to establish that he or she has a substantial relationship with the child" (*ibid.*); and they "do not require the court to take into consideration such factors as the parents' reasons for restricting visitation[.]" *Ibid.*

We emphasize that the Washington statutes fail strict scrutiny *not* simply because they employ a "best interests" standard and *not* simply because they authorize third-party visitation to which the parents object. The problem here is that *no threshold finding* is required before competent, fit, non-abusive parents are required to take on the burdens, costs, and insult of litigating and defending in court their child-rearing and visitation decisions at "any time" and at the behest of "any person" who disagrees with them.

E. The Washington Statutes Are Unconstitutional on Their Face, and This Court Should Resist Petitioners' Efforts to Distract Its Attention from the Intrusiveness of the Washington Statutes to the Standard of Review.

In their Petition for Certiorari, the Petitioners insisted that this Court's review was necessary to "address[ ] the welfare of our children and preserv[e] the family in the future" (Pet. 11); to reject the "conservative" view of the "stable family unit" (*id.* at 13); to recognize a new set of "penumbra[l]" constitutional "responsibilities" of parents to "sustain loving and nurturing relationships between their children and third parties" (notwithstanding the parents' different view about the "nurturing" character of those relationships) (*id.* at 15); and to

"replace[ ]" "parental authority" with "parental responsibility in recognition that children's views and wishes should be taken into account." *Id.* at 17.

The Petitioners now purport to advocate a more narrow and measured course. They take pains to assure the Court that they are not asking for the creation of any new or novel rights (Pet. Br. 7, 18) ("We do not contend that grandparents have a constitutional right to visitation orders.") and they concede that granting third-party visitation over parents' objections *could* violate parents' rights (*id.* at 33, 39). The Petitioners' new, "far less categorical" approach (*id.* at 20) is to observe that the court below "did not rely on, and respondent did not there advance, any circumstance-specific constitutional objection to the application of the [statute] to this particular case" and that "[t]he court below properly dealt with this case as presenting only a facial challenge to the constitutionality of the Washington statute." (*Id.* at 19). However, the Petitioners assert, "[a]bsent a showing of the general invalidity required by [*United States v. Salerno*, 481 U.S. 739 (1987)] or [*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)], . . . there would be no occasion to consider the constitutionality of [the statute] in circumstances other than those of the instant case." Pet. Br. 21.

Although we welcome the Petitioners' newfound commitment to judicial restraint, we reject their argument and the purported modesty of their positions. *The Washington statutes at issue are unconstitutional on their face* – or, as the court below put it, "as written" (Pet. App. 1a) – and *not* simply "as applied" to this or any other particular case. The Respondent *can* establish, and did establish to the satisfaction of the court below, that almost all applications of the Washington law are unconstitutional.

The particular visitation order at issue in this case, as well as *every* application of the Washington third-party visitation laws, is unconstitutional because the statutes permit, *in every case*, "any person" to drag a parent into court "at any time" and for any reason to justify their decisions about third-party visitation to a court. That is, the Washington statute – *in every case* – fails to provide the constitutionally required respect and protection for competent, non-abusive parents' decisions about third-party visitation. It *does not matter* that some of the visitation orders issued under the Washington laws might also have issued under a constitutional standard or statute. It is the fact that, *on its face and in every case*, the Washington laws subject competent, fit, non-abusive parents' decisions to judicial second-guessing (outside the context of custody or like proceedings) on the whim of "any person," that dooms these *particular*, extraordinarily broad, visitation statutes.

* * *

This Court has held – and we believe it should reaffirm – that parents' rights and family autonomy are "fundamental" aspects of the "liberty" protected by the Due Process Clause and therefore that "strict scrutiny" must be directed toward any State's law that infringes on those rights. These basic principles are perfectly consistent with the responsible, measured use of the States' police and *parens patriae* powers to protect children from harm, abuse, and neglect, but they preclude the kind of unjustified and intrusive second-guessing of parents' decisions about third-parties' contact with and influence upon their children that the Washington visitation statutes encourage.

II.

Parents' Right to Decide Who and What Are Appropriate Influences on Their Children's Development, Education, and Character Is Expressive Activity Protected by the First Amendment.

An alternate, but closely related, constitutional basis for affirming the judgment below is that the Washington statutes curtail parents' expressive-association rights protected by the First Amendment.

A. The First Amendment Protects Expressive Association from Co-option and Censorship by the State.

In affirming the decision below, this Court should be guided not only by its substantive-due-process line of parental-rights cases, but also by its expressive-association precedents. It is "beyond debate" that "freedom to engage in association for the advancement of beliefs and ideas" is not only part of the "liberty" protected by the Fourteenth Amendment but is *also* inextricably linked with the freedoms of speech and expression guaranteed by the First Amendment. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Just as governmental attempts to control, shape, or co-opt the content of our expression are subject to strictest judicial scrutiny, so too are any state efforts to insinuate itself, its priorities, and its ideas into private associations and the messages they communicate, both internally and to the world. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."); *Democratic Party of United States v. Wisconsin ex rel. LaFollette*,

450 U.S. 107, 122 (1981) (First Amendment rights "necessarily presuppose[ ] the freedom to identify the people who constitute the association, and to limit the association to those people only."); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (Upholding "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right to decide "what not to say").

It is often observed that one of the theoretical bases for our First Amendment freedoms is their crucial role in nurturing and creating citizens who are well prepared to exercise the responsibilities that necessarily attend participation in a democratic republic. The same is true of the various "mediating institutions," "intermediate associations," and "little platoons" of democracy that make up what political scientists and philosophers call "civil society" – the public realm between the person and the state[18] – which is one reason why this Court has taken care to protect expressive *association* as well as individual speech-acts. *See Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."); *id.* at 618-619 ("[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster

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[18] *See generally, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513-524 (1969 ed.); PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY (1977).

diversity and act as critical buffers between the individual and the power of the State.").

B. The First Amendment's Protection of Expressive Association Extends to Family Autonomy and to Parents' Choices about the Education and Upbringing of Their Children.

What this Court has said about the membership and message of parade organizations and benevolent organizations, and about the importance of mediating institutions, translates easily to the first among all expressive associations – the family. Of all the mediating, values-inculcating institutions – which deserve protection both for their own sake *and* for the sake of the democratic values that require them – surely the family is primary, both in time and in importance. Just as groups must be able to control their message to the world, free from unjustified government intrusion into their membership, rituals, and commitments, so must the decisions of parents to control and shape their family's character formation by determining who and what shall have access to their child be unfettered by intrusive and unwarranted judicial "proof-reading."

As some of this Court's decisions illustrate, the fundamental "liberty" rights of parents to direct and control their children's upbringing will in many cases complement religious-freedom rights protected by the Free Exercise Clause. *See, e.g., Wisconsin v. Yoder, supra.*[19] Indeed, courts and commentators sometimes fail to remember

[19] As we discussed above, however, it does not follow from this complementarity that family integrity *must* ride in tandem with First Amendment rights in order to be deemed and protected as "fundamental."

that, given the historical context out of which cases like *Meyer* and *Pierce* arose – a context of nativist hostility to the culture, language, *and religion* of many immigrants[20] – those cases are reminders of the need to safeguard the rights of religious and ethnic minorities as well as clear statements of parents' rights to build a family culture, to communicate values to their children and shape their character, and thereby to express their commitments and priorities to society.

In a similar way, the Fourteenth Amendment's promise of "liberty" to parents and autonomy to families mirrors the First Amendment's safeguards for expressive association. This notion that decisions about childrearing, third-party access, and education – decisions that under the Fourteenth Amendment, are, except in unusual cases, entrusted to the realm of family integrity and parental direction – are *expressive* and *communicative* decisions is not a novel or expansive idea. *See, e.g., Moore,* 431 U.S. at 503-504 ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). Indeed, the Washington Supreme Court itself observed, in striking down Washington's laws, that "parents should be the ones to choose whether to expose their children to certain people or ideas." Pet. App. 22a.

The law does not tell parents – at least not yet – who are deciding what school would be best for their child, or which friends' influences are likely to be beneficial, or whether their child is ready for contact football, or for a PG-13 movie, or for a date with the class president, "do

[20] *See generally, e.g.,* JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 151-156 (1999).

whatever you choose, so long as it is what I would choose also," Pet. App. 21a (citation and internal quotation marks omitted). This is because, when making these and other decisions, parents are not merely setting rules, they are *expressing* and *communicating* their values to their child and also to the community. *See, e.g., Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (noting important role of the family in "promot[ing] a way of life through the instruction of children"). By keeping a watchful eye on the forces and influences that shape a child – for whose character and conduct society will rightly hold them accountable – parents are, in a very real sense, speaking to their children and to the community about what is important. Under our Constitution, the State may not, in the usual course of things, co-opt these messages. *See, e.g., Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (noting that the law at issue would "deprive parents of a fair opportunity to procure for their children instruction which they think important and we cannot say is harmful"); *compare Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). Washington's third-party visitation laws – which, at the request of "any person," subject *every* parental decision about third-party access to a judicial determination about a child's "best interests" could preclude many low-income parents – who lack the resources to defend their decisions in court – from enjoying the fulfillment and satisfaction such expression brings.

That the content of parents' message is sometimes diffuse does not lessen its claim to constitutional protection. *See Hurley*, 515 U.S. at 569 ("a narrow, succinctly articulable message is not a condition of constitutional protection."). Nor should it matter that, in the opinion of outsiders – of the "any person" whom the Washington statutes empowered to seek a judicial veto of parents' decisions – the content of the family's message, of parents' communication to their children, of parents' decisions about who and what messages should be permitted access to their child, could be improved. *Hurley*, 515 U.S. at 581 ("Disapproval of a private speaker's statement does not legitimize use of the [government's] power to compel the speaker to alter the message by including one more acceptable to others."). In the words of the court below, "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision" (Pet. App. 21a-22a) anymore than the State has the power to revise the content of a political candidate's message or a minister's sermon because it thinks it could communicate a "better" message.

CONCLUSION

For all the foregoing reasons, we urge the Court to affirm the decision and judgment of the court below.

Respectfully submitted,

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APPENDIX

STATEMENT OF INTEREST OF *AMICI*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center labors to preserve religious liberty in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides accurate information to the public and political branches concerning the interaction of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of many individuals, Christian and non-Christian, and on behalf of many religious organizations in virtually every case before the Supreme Court involving church/state relations.

This nation's Declaration of Independence "instituted a new government" by announcing that it was "laying its foundations on [immutable] principles." One of these "self-evident truths" was that all persons are divinely endowed with rights that no government may abridge nor any citizen divest. Among such inalienable rights are those enumerated in – but not conferred by – the First Amendment, the foremost of which is religious freedom.

The right to freely exercise religious conscience inheres in all persons by virtue of its endowment by the Creator. It is also a "constitutional right," but in the sense that it is recognized in rather than created by the United States Constitution. Because the source of religious liberty, as acknowledged in the Declaration, is the Creator, not a constitutional amendment, statute, or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of federal, state, or local government. This nation has no higher duty than to protect inviolate its full and free enjoyment. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . . "

The protection of the right of parents to direct the upbringing of their children without State interference absent a compelling state interest – the core issue in this case – is a vital component of the protection of individual liberty (including, but not limited to, religious liberty) for all citizens. The fundamental "liberty" rights of parents to direct and control their children's upbringing will in many cases complement religious-freedom rights protected by the Free Exercise Clause. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Given the historical context out of which they arose – a context of nativist hostility to the culture, language, *and religion* of many immigrants – the leading parental rights cases, *Meyer* and *Pierce*, are reminders of the need to safeguard the rights of religious and ethnic minorities as well as clear statements of parents' rights to build a family culture, to communicate values to their children and shape their character, and thereby to express their commitments and priorities to

society. See *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The Christian Legal Society's national membership, 25 years of experience, and professional resources enable it to speak with authority upon religious liberty matters before this Court.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

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IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF *AMICUS CURIAE* CENTER FOR CHILDREN'S POLICY PRACTICE & RESEARCH AT THE UNIVERSITY OF PENNSYLVANIA IN SUPPORT OF RESPONDENT

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F. The Court should defer to the expertise of state legislatures, state courts, and bodies such as the American Law Institute, currently engaged in the task of generating appropriate standards to apply in authorizing court ordered visitation with extended family and informal kin. 21

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STATEMENT OF INTEREST

The Center for Children's Policy Practice & Research at University of Pennsylvania (hereinafter CCPPR) is a joint project of the University of Pennsylvania's Schools of Law, Medicine and Social Work.[1] It also draws associated faculty from every part of the campus, including Arts and Sciences, Business, Communications, Education, and Nursing. CCPPR employs a team structure in all its scholarly, advocacy, and research activities, assembling specialists from each relevant discipline to study and evaluate proposed and existing children's laws and policies in fields such as child welfare, education, juvenile justice and medicine. Faculty of CCPPR serve on task forces and advisory commissions and CCPPR provides expert advice to government agencies working with children. CCPPR also provides clinical services, using interdisciplinary teams of doctors, lawyers and social workers, to evaluate the needs of individual "at risk" children and their families.

The mission of CCPPR is to mobilize the resources of a nationally known university research faculty around issues of child welfare policy. Among our primary goals is to assure that courts and legislatures have access to a body of sound and reliable interdisciplinary research and analysis necessary

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1. The CCPPR faculty who participated in the research and drafting of this brief include specialists in child psychology, pediatric psychiatry, social work, family sociology, and legal history. Counsel for a party did not author this brief in whole or in part, and no other entity, other than amicus curiae, have made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37 of the Rules of this Court, the parties consented to filing of this brief, and copies of their consents have been filed with the Clerk of the Court.

to understanding children's issues and to evaluating the broader implications of laws and decisions affecting children.

The purpose of this Amicus Brief is to highlight the potential effects of this case on hundreds of thousands of children who are currently in state care or at risk of entering state care.

STATEMENT OF THE CASE

Amicus Curiae, the Center for Children's Policy Practice and Research, makes no comment on the statement of the case.

SUMMARY OF ARGUMENT

The judgment of the Washington Supreme Court should be affirmed, to the extent it rests on a finding that the statute was so vague as to subject children and their families to arbitrary intrusions by virtual strangers. While we support respondent's position that a statute allowing "any person at any time" to seek visitation is unconstitutionally vague, we urge the Court to proceed with caution. In deciding this case, it should avoid any language that would cast doubt on the authority of the courts to protect and promote the stability of over 3,000,000 children residing with kin and extended family and over 500,000 children in foster care. Extended family and kin networks play a central role in meeting the needs of America's "at risk" children and, in many circumstances, policies recognizing and supporting such relationships function to promote rather than undercut constitutional values of family autonomy. The state's role in protecting and preserving family relationships is qualitatively different from the forms of state intervention

this Court has previously addressed. State courts and legislatures should be free to protect and foster children's family relationships by developing family law statutes and case law that balance the needs, rights, and interests of all parties.

This Court should avoid sharpening the battle of rights over children by delineating a fixed scheme of constitutional priorities that unduly emphasizes the rights of parents and devalues the role of grandparents, extended family and informal kin. Such a ruling would impede the operation of recently enacted federal and state child welfare laws and policies. In many contexts, conferring rights on some family members to exclude others does not further family autonomy or privacy. Instead, it undermines policies that would strengthen the family by maximizing children's family resources and protecting children's family attachments. Nothing in the Court's jurisprudence should preclude state courts and legislatures from favoring reasonable family law and child welfare policies that protect extended family and kinship ties.

The framing of laws on custody and visitation has always been a matter of state law, and states have long recognized the importance of children's relationships with persons other than their parents. While the Court has held that the state may not *exclude* certain persons from the family, it has never dictated whom the state may permissibly *include*. The state has a compelling interest in protecting children's attachment relationships since those relationships are vital to the child's healthy development. Recognizing the diversity and individuality of family life, the Court should defer to the expertise of state and local entities currently engaged in generating appropriate standards to apply in individualized

adjudications. Family courts must retain their traditional authority, in deciding issues of children's custody and visitation, to examine the needs and interests of the child in the context of his or her unique familial history and cultural and social setting.

ARGUMENT

A. State agencies dealing with "at risk" children must be free to protect and foster children's relationships not only with parents but also with extended family and informal kin, as a means of preserving family autonomy and integrity and avoiding undue state intervention in the family.

This case involves a private custody dispute. However, the constitutional issues raised have broad ramifications for other adjudications involving custody and visitation, including cases in the public child welfare system. This Court should avoid a decision that suggests that parents who have not been held unfit have a constitutional right not only to maintain contact themselves with children but also to exclude other family members and informal kin from contact with children.[2] Such a decision would hamper judges and child welfare agencies seeking to assure children's rights to continuity and stability in their familial relationships. It would be especially harmful to the most vulnerable children — those

2. Throughout this brief, we use the term "extended family" to describe persons related to a child by blood, marriage or adoption and the term "informal kin" to describe persons who may lack a biological tie or legal tie, but are recognized as kin by the child and/or within the child's family and community. Examples include stepparents, Godparents, informal "Aunts" and "Uncles," and other de facto family members.

in foster care and formal or informal kinship placements, who look to extended family, Godparents, family friends and others in the community for a sense of permanency and family connection.

The following illustrations, drawn from actual child welfare and family court cases in the City of Philadelphia, show the harm and disruption that would follow were the Court to delineate such a right, even in dicta.

Illustration A:

> Alfred is a thirteen year old diabetic boy who has been in state custody for eight years. His mother is unable to assume responsibility for his care, because her mental illness prevents her from meeting his medical and emotional needs. His father died when he was ten. Alfred wishes to visit his paternal grandfather, to whom he is deeply attached, but his mother refuses permission without justification. Mother's parental rights have not been terminated.

Must the state child welfare agency honor the mother's directive, without consideration of the child's best interests or of the child's right to nurturing family relationships? Currently, a court is free to decide this case according to the best interest of the child. Alfred's family resources are precious and few. As he grows to adulthood, "aging out" of the foster care system, the support of extended family will become increasingly essential to his well-being. Assuming the grandfather is a responsible individual, Alfred's yearning for contact with his deceased father's family should outweigh his mother's arbitrary objection.

Illustration B:

> Betty is being raised by Mrs. G., her Godmother. Betty's biological mother left Betty in Mrs. G's care shortly after her birth. Betty has had sporadic contact with her mother but she refers to Mrs. G. as "Mommy" and views the G. children as her siblings. When Betty is five years old, the biological mother argues with Mrs. G. and then seeks a court order to regain custody of the child and to bar any further contact between Betty and Mrs. G and her children.

What options does the family court have to protect Betty's relationship with her Godmother? Here, the mother has acquiesced in creating a family relationship between her child and Mrs. G. A state might conclude that rules giving strict priority to the biological parent discourage blood and informal kin from coming to the aid of children in crisis. Relatives and informal kin, functioning as de facto parents, may be open to blackmail and coercion by a long absent biological parent if their relationship with the child is completely unprotected. In cases such as these, courts must be able to balance the rights of the parent with the needs of the child and fairness to the de facto parent. Most states wisely recognize standing to seek custody and visitation on the part of persons such as stepparents, grandparents and de facto parents who have served "in loco parentis" to a child.[3]

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3. *See infra* notes 30-37 and accompanying text.

B. A ruling suggesting that parents' possess broad autonomy rights to control a child's contact with extended family members would impede the functioning of recently enacted federal and state child welfare legislation.

An array of state laws on custody, adoption, guardianship, and foster care help mediate disputes over children within re-configured families and provide substitute families when children's families of origin are disrupted or cannot meet their needs. When the state intervenes to remove a child from his family, for example in a child abuse or neglect proceeding, it must show that state intervention is clearly necessary, not merely in the child's best interest.[4] In order to terminate a parent's rights, the state must show relevant state law grounds for termination by clear and convincing evidence.[5] However, with the exception of certain crucial decisional rights retained by the parent, once the child has been placed in care, the family court applies a best interest standard to decisions about the child's care.[6]

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4. *E.g., In re S.A.D.*, 382 Pa. Super. 166, 555 A.2d 123 (1989).

5. *Santosky v. Kramer*, 455 U.S. 755 (1982), holds that states must have "clear and convincing evidence" that the parents would be unable to care for the child before terminating parental rights. Any lesser standard would violate the parent's constitutional rights to due process under the Fourteenth Amendment.

6. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, n.20 (1977) notes that the parent of a child in foster care retains certain crucial rights such as the right to authorize surgery, give permission for marriage or military service.

To place the issues of kinship custody and visitation in a child welfare context, the next section will review current federal and state laws. Beginning with the Social Security Act of 1935, Congress has passed a sequence of federal laws that conditioned the receipt of funding to defray the costs of child welfare programs on the state's conformance with certain standards and procedures. The Adoption Assistance and Child Welfare Act of 1980 (hereinafter "AACWA") was passed in response to concerns that children were being removed unnecessarily from their homes and then left to drift in foster care. In AACWA, Congress created strong incentives for states to pass child welfare laws that would emphasize family preservation and reunification.[7] AACWA offered federal funds to the states for foster care and other services, but only if the state enacted laws guaranteeing that in each case, reasonable efforts will be made (A) prior to placement of a child in foster care to prevent or eliminate the need for removal or the child from his home and, (B) to make it possible for the child to return to his home. Only if the parent showed no progress over an extended period of time despite the state's best efforts, would it be appropriate to terminate the parent-child relationship and begin planning for adoption or permanent guardianship.

Alarmed by the rising numbers of children growing up in state care, Congress enacted various amendments to AACWA. In 1996, an amendment recommended that states give preference to placing children with relative care givers over a nonrelative.[8] The following year, the Adoption and

7. AACWA or PL 96-262, is codified at 42 U.S.C. §§ 620-629a, 670-679a.

8. 42 U.S.C. § 671(a)(19).

Safe Families Act (hereinafter "ASFA"),[9] introduced a new concept, the concept of "concurrent planning." Concurrent planning authorizes the agency to plan simultaneously for two mutually exclusive alternative options, such as adoption and reunification.[10] The operative language of ASFA reads:

> (F) reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts of the type described in subparagraph (B) [reunification/ preservation].

ASFA envisions that the agency be able to work concurrently with the parent, who still retains certain parental rights, and with others (preferably relatives) to plan for the future care of the child in the event the parent's efforts at rehabilitation should fail. Often, the most valuable resources for such children are extended family, Godparents, or other informal kin. Illustration C shows the danger posed by a ruling suggesting that the parent of a child in care has a right not only to regain custody and maintain contact, but also to exclude other family members from custody or contact.

Illustration C:

> Calvin and Carrie, are premature twins who tested positive for heroin exposure at birth. The twins are placed in state care while the parents enroll in a drug rehabilitation program as a first step toward regaining custody. The state agency

9. 42 U.S.C. § 671 & ff.

10. 42 U.S.C. § 675(F).

> responsible for Calvin and Carrie locates several kinship foster placements, one with their maternal aunt and an alternative placement with the paternal grandmother. Both are eager to provide a home for the children and both agree to adopt them, should their parents fail to overcome their addiction. The parents object, preferring that the infants be placed with unrelated foster parents rather than family members. They also object to visitation between the children and these relatives.

Does the state agency infringe the parents' constitutional rights by promoting kinship placements for children? In this case, the interests of the children in bonding with and being raised by family members, and the interests of the state in minimizing the children's time in state care and in utilizing available family care networks, should prevail over the arbitrary exercise by the biological parents of a right to exclude other family members from consideration. In these cases, a preference for kinship placements and adoptions actually serves to promote family privacy and autonomy by placing children in family care.

C. Relationships with extended family and unrelated kin serve the values of family autonomy, because they provide stability and continuity during periods of economic stress and structural change, reducing state displacement of the family as the unit of child rearing.

Nothing in the Courts prior cases suggests that the child welfare policies described above infringe family autonomy. As this section will explain, protection of ties to extended family and unrelated kin, may serve to preserve rather than to threaten the broad values of family autonomy so important

to a democratic society. Although the term "family" is nowhere mentioned in the U.S. Constitution, this Court has interpreted the scope of the "liberty" protected by the Fourteenth Amendment as reaching the rights to marry and raise a family. *Loving v. Virginia*, 388 U.S. 1 (1967) (fundamental right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (same). *See also Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing that the family and not the state is responsible for child rearing); *Stanley v. Illinois*, 405 U.S. 645 (1972) (protecting children's family relationship with unmarried biological father); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (parents' rights to inculcate religious values). These cases have generally involved a conflict between the family and the state over educational, medical or police power intrusions. Their message is one of protecting the family from intrusive state intervention. While many of the Court's family autonomy cases involve parents, the Court has recognized autonomy and privacy rights in other family relationships. One of the earliest cases discussing family autonomy, *Prince v. Massachusetts*, 321 U.S. 158 (1944), involved an aunt and her niece. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court accorded constitutional protection to a grandmother and her grandson.

American families come in many shapes and sizes, and anthropologists remind us that the nuclear family, "[t]he one considered 'normal' or 'natural' to us is in fact no more normal or natural than any other."[11] Customs and practices vary among the many ethnic and cultural groups comprising our society, and the pattern of family life changes with changes in economic and social structures. In modern

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11. William A. Haviland, Anthropology 461 (6th ed. 1991); Jerome Kagan, The Nature of the Child 273-276 (1984).

America, the nuclear biological family is only one among a variety of family structures. Only half of the nation's children in 1994 lived in "traditional" nuclear families with their two biological parents.[12] In 1995, approximately 82% of Caucasian households were comprised of a married couple with children, while among Hispanics the figure was 68% and among African Americans the figure was 47%.[13] Within the population of children living in married, two-parent households, some 14% live with a parent and a stepparent. Approximately 4% of children live with neither parent.

Extended families are important to children from every ethnic and racial community. The latest reports from Pennsylvania, where CCPPR is located, indicate that over 150,000 children under eighteen live with grandparents — 5.4 % of the total number of children in the state. In Pennsylvania, there are more white, non-Hispanic children being raised by their grandparents than black children — 43.6 % compared with 35.9 %.[14] Nationally, the 1990 Census showed that 3.6% of white children and 12% of black children lived with their grandparents. In the past decade, the estimated number of children being raised in both formal and informal kinship arrangements rose from 2,000,000 to over 3,000,000. In 1993, over 3,368,000 American children lived in households identified as grandparent-headed households. In one third of these families, there was no parent

12. Arlene F. Saluter, *Marital Status and Living Arrangements*: March, 1994, Current Population Reports 20-484.

13. Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, 1 J. L. & Fam. Stud. 1, 5 (1999).

14. Jen Darr, *Unplanned Parenthood*, Phila. City Paper 25, 26 (December 9, 1999).

present, a figure which was on the rise, growing from 876,000 children in 1992 to 1,017,000 in 1993.[15] To put these data in perspective, approximately six times as many children are living with extended family as are currently being cared for by the state, in foster homes and institutional settings. Without the resources of grandparents and other kin, the numbers of children in state care would grow exponentially. For these families, the values of constitutional privacy and family autonomy are served by laws that protect extended and informal family ties.

Children whose families are in crisis, whether through divorce, death or illness, are especially likely to benefit from support of the extended family.[16] In addition to parents and extended family, various informal kinfolk can also play a crucial role in the child's safety net. Often, the family and community may confer the title of "grandparent" or "aunt" or "Godparent" on a person with no blood relationship to the child to signify a special relationship and a special obligation to the child.[17] Families of African-American,

15. Andrea G. Hunter & Robert J. Taylor, *Grandparenthood in African American Families*, 76, in Szinovacz (ed.) Handbook on Grandparenting (1998); American Association of Retired Persons, Going It Alone: A Closer Look at Grandparents Parenting Grandchildren n.1 (1994) (percentage of children living with grandparents but without a parent in the household increased by 17% between 1992 and 1993).

16. National Institute on Aging, Grandparents in American Society: A Review of Recent Literature (Rachel Pruchno, Ph.D. 1995); Andrew J. Cherlin & Frank F. Furstenberg, Jr., *Grandparents & Family Crisis*, Generations 10 (4), 26-28 (1986).

17. Oriol Pi-Sunyer & Zedneck Salzmann, Humanity and Culture: An Introduction to Anthropology 250-251 (1978). Among

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Asian, or Hispanic cultural background have traditionally relied on the resources of extended family or informal kinship networks. Studies of African-American families show that supportive social networks, flexible relationships and roles within the family unit, and extensive use of extended family helping arrangements have served a vital role and have assisted families in weathering social and economic problems.[18] Studies of Chinese-American families show that child-rearing responsibility and authority may be shared by aunts, uncles, and family friends, with paramount authority often vested in a grandparent.[19] As these studies illustrate, while deference to the family is deeply rooted in American

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Latin Americans, the social institution of *compadrazgo*, or godparenthood, plays a crucial role, creating a core relational commitment between the child and sponsor as well as between the sponsor and the child's parents. *Id.* In a black community, friendships can develop "fictive kin" status, through sharing of caregiving responsibilities. Carol B. Stack, All Our Kin: Strategies for Survival in a Black Community 60 (1974).

18. Harriette P. McAdoo, *African-American Families: Strengths and Realities* in H. McCubbin, E Thompson, A. Thompson & J. Futrell, eds, Resiliency in Ethnic Minority Families 22 (1995); Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 Temple L. Rev. 1649, 1658-67 (1995).

19. Nina Wang Helmer, *Helping Chinese Families with Their Children's Psychiatric Problems*, American Academy of Child and Adolescent Psychiatry News 227-28 (Nov.-Dec. 1999) (citing D. Shrier, C. Hsu, X. Yang, *Cross-Cultural Perspectives on Normal Child and Adolescent Development: Chinese and American*, in II International Review of Psychiatry 301-66 (F.L. Mak & C.C. Nadelson, eds. 1996)).

history and tradition, the American family is highly diverse in its structures, its functioning, and its traditions. One way to protect broader family autonomy values is to recognize and support children's kinship structures in formulating policies for children in state care or at risk of entering state care.

D. The Constitution protects the family from invidious state intrusion, but it does not dictate how state courts, in their roles as mediators of intra family disputes or as guardians of children's rights to family relationships, must resolve conflicts between family members.

While the Court has held that the Constitution protects "the family," writ large, it has never assumed the role of discriminating among family members or of determining who among the parties in a family matter should take priority. The historical record demonstrates that, since the early days of the Republic, state legislatures and courts have determined as a matter of state law which persons claiming family status have standing to seek custody or visitation and which persons may be accorded rights and charged with responsibilities toward the child. The historical record also demonstrates the traditional power of the states to reformulate their approach to custody and visitation to recognize changes in family life. Women's equality, emerging recognition of children's rights, new research in child psychology, and new social and legal developments such as no fault divorce, adoption, and unmarried parenthood, have reshaped the structures and redefined the needs of American families and states have responded by modifying their laws on custody and visitation.

Colonial era laws recognized the father's rights as superior to all others. Nevertheless, local courts always had the power to deviate from this rule in individual cases.[20] By the 1840s, various states had adopted laws or doctrines rejecting the paternal preference in favor of the best interest standard, and holding that "the rights of the parents to their children, in the absence of misconduct, are equal and the happiness and welfare of the child are to determine its care and custody."[21] According standing to extended family and informal kin is nothing new. Nineteenth century disputes involved not only biological parents, but stepparents, grandparents, extended family members, parents by equitable adoption, or persons standing "in loco parentis." These surrogate parents often prevailed over fit biological parents, when courts found that the surrogate parenting relationship served the child's best interest.[22] The balancing of competing claims to contact with and custody of children is quintessentially a state law matter. As the Texas Supreme Court in 1894 summarized the State's role:

> "The State, as protector and promoter of the peace of organized society, is interested in the proper education and maintenance of the child, to the end

20. Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 236 (1985).

21. See Grossberg, at p. 241, n.13. *See also Ahrenfeldt v. Ahrenfeldt*, 1 Hoffm. Chan. 497, 502 (N.Y. 1840); *People v. Mercein*, 25 Wend. 64 (N.Y. 1840).

22. *See Chapsky v. Wood*, 26 Kan. 650 (1881) (confirming custody with an aunt); *Green v. Campbell*, 35 W. Va. 699 (1891) (grandparents); *Sheers v. Stein*, 75 Wis. 44 (1889) (aunt); *Jones v. Darnall*, 103 Ind. 569 (1885) (maternal grandparents).

> that it may become a useful instead of a vicious citizen; and while as a general rule it recognizes the fact that the interest of the child and society is best promoted by leaving its education and maintenance, during minority, to the promptings of paternal affection, untrammeled by surveillance of government, still it had the right in proper cases to deprive the parent of custody of the child when demanded by the interests of child and society."

Legate v. Legate, 87 Tex. 248, 251 (1896) (recognizing the claims of a child's foster parents to continued custody).

Custody and visitation laws have also changed in response to new discoveries in the science of child development and to new challenges in the sociology of the family. Examples include the creation during the Nineteenth Century of adoption laws and the development during the Twentieth Century of rules for shared or joint custody and court ordered visitation with persons other than the custodial parent. These new laws responded to basic changes in society and, more importantly, to basic research establishing children's needs for permanency and for continuing contact with important family figures. States must have wide latitude to respond to the evolving needs of children and families, without encountering a constitutional straight jacket that confines family, and thus family autonomy, to its narrowest definition.

This Court has intervened in the past when the State attempted to confine the scope of family to the nuclear model of a married couple and their children, thereby infringing on family autonomy. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), a zoning ordinance defined "family" so

narrowly as to preclude a child from residing with his paternal grandmother after his mother had died. The Court interpreted its precedents as protecting the extended family as well as the nuclear family from state intrusion, noting that "[e]specially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." 431 U.S. at 505. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held that an unmarried father who had lived with and supported his children and their mother for many years in a common law relationship could not be treated as a mere stranger by the state following the mother's death.[23]

While the Court, in cases like *Moore* and *Stanley*, has held that the state may not impermissibly *exclude* certain persons from the definition of family, it has never dictated whom the state may permissibly *include*. Imagine, for example, that Inez Moore's son, who had left his child in

23. *Stanley* and its aftermath provide a note of caution regarding the unintended consequences to children of broadly worded decisions. Dicta in *Stanley* seemed to suggest that a man might assert paramount rights over a child based purely on biological paternity. 405 U.S. at n.9 (all unmarried fathers are constitutionally entitled to notice and an opportunity to be heard). This dicta spawned great uncertainty about the authority of the states to enter an adoption decree without express consent from the child's biological father–even when the identity and whereabouts of the father were unknown and the child had been living for years in foster care. It required many years and a long sequence of decisions to clarify that a "developed relationship" with the child is a necessary component of the biological parent's constitutional right. *See Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

her care at age one, following the death of the child's mother, suddenly returned and sought to prevent any further contact between grandchild and grandmother. Nothing in the Court's family jurisprudence suggests that the Constitution would prevent the State of Ohio from protecting the relationship between grandmother and grandchild. In past, the Court has carefully avoided displacing the power of the states to determine rights and priorities among persons claiming family membership. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court sustained against constitutional challenge a California statute that prevented the unmarried biological father of a child born to a married woman from seeking custody or visitation. The Court declined the invitation to declare that either the marital or the biological father had a superior liberty interest in a relationship with the child. "Our disposition does not choose between these two 'freedoms' [of the marital father and the biological father], but leaves that to the people of California." 491 U.S at 130. As *Michael H.* illustrates, many factors besides the rights of a biological parent are at play in state policies regarding child custody and visitation. The Constitution allows wide latitude in developing family laws and policies that balance the interests of child and state with the interests of persons claiming family membership.

Of course, a state law framed so broadly as to obliterate the meaning of "family" may impermissibly intrude on the privacy and liberty of the family. The Washington Court interpreted the statute at issue in this case as permitting "any person" to seek visitation "at any time" without establishing a threshold showing of any kind. Interpreted thus, the statute authorizes virtual strangers to intervene in family matters. Visitation with family intimates to whom a child is attached, however, stands on a different footing.

E. The state has a compelling interest in protecting children's attachment relationships, since those relationships are vital to the child's healthy development.

From a developmental perspective, "the family is the basic unit of growth and experience, fulfillment or failure."[24] The child's family relationships take many forms and are defined by the child's interactions with family figures. Modern developmental psychology and neurology confirm the critical importance to children of "attachment relationships." An attachment relationship is defined as "a reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver" through which children "form their concepts of self, others and the world."[25] The child who does not have the opportunity to be loved, comforted, and cared for by a nurturant adult or family grows with significantly more risk for psychopathology and arrested developmental potential. Attachment relationships serve to create the central foundation from which the mind develops. They are the major environmental factor that shapes the development of the brain during its period of maximal growth. Studies of brain development have shown that human connection actually creates neuronal connections.[26] There is also clear evidence that attachment relationships confer resilience and promote more flexible modes of adaptation in

24. Nathan W. Ackerman, The Psychodynamics of Family Life 15 (1953).

25. Beverly James, Handbook for Treatment of Attachment-Trauma Problems in Children 1-3 (1994).

26. Daniel J. Seigel, The Developing Mind: Toward a Neurobiology of Interpersonal Experience 67-120 (1999).

the face of adversity. It is also clear that neglect and trauma in childhood have a toxic effect on brain development as evidenced by hippocampal atrophy and memory deficits in stress.[27]

Sometimes a child's most crucial attachment relationship is formed with a person who has assumed the functional role of parent but is not the legal or biological parent. Rupture of such a relationship can be emotionally devastating to the child. While all children need at least one individual to love and be loved by, children's attachment needs may be met through consistent, quality care provided by multiple attachment relationships, as is common in interdependent extended families and tribal and clan systems.[28] It is undisputed, however, that attachment relationships are vital to children's normal and healthy development.

F. The Court should defer to the expertise of state legislatures, state courts, and bodies such as the American Law Institute, currently engaged in the task of generating appropriate standards to apply in authorizing court ordered visitation with extended family and informal kin.

In response to research on child development and the importance of children's attachment relationships, the strong trend in recent years has been towards broadening courts authority to order visitation with extended family and kin. Despite the trend towards broadening visitation, there is still

27. *Id.* at 1-23.

28. Albert J. Solnit, Barbara F. Nordhaus, Ruth Lord, When Home is No Haven: Child Placement Issues 2 (1992).

a substantial amount of experimentation regarding the circumstances in which to grant standing to persons other than a parent to petition for visitation and when to grant such visitation. In dealing with children in state care, the trend is towards increasing use not only of kinship custody but also of sibling visitation and contact with extended family to maintain the child's sense of continuity and stability.[29]

Some state custody statutes provide that persons whom we have referred to as extended family or informal kin, who are neither parents nor grandparents, may petition for visitation. These include great-grandparents,[30] stepparents,[31]

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29. Faith Johnson Bonecutter & James P. Gleeson, *Broadening Our View: Lessons from Kinship Foster Care* in The Challenge of Pemanency Planning in a Multicultural Society (Gary R. Anderson, *et al.*, eds. 1997).

30. Ariz. Rev. Stat. Ann. § 25-409 (West, WESTLAW through 1999 1st Reg. Sess. and 1st & 2nd Spec. Sess.); Ark. Code Ann. § 9-13-103 (WESTLAW through 1999 Reg. Sess.); Idaho Code § 32-719 (LEXIS, WESTLAW through 1999 Reg. Sess.); 750 Ill. Comp. Stat. 5/607 (West, WESTLAW through P.A. 91-6, apv. 5/28/1999); Iowa Code Ann. § 598.35 (West, WESTLAW through 8/18/1999); Minn. Stat. Ann. § 257.022 (West, WESTLAW through 1998 1st Sp. Sess.); N.D. Cent. Code § 14-09-05.1 (LEXIS, WESTLAW through 1999 Reg. Sess.); Okla. Stat. Ann. tit. 10, § 5 (West, WESTLAW through 1999 1st Ex. Sess., ch. 6); 23 Pa. Cons. Stat. Ann. § 5313(a) (West, WESTLAW through 1999, Act 37); Wis. Stat. Ann. § 767.245 (West through 1999, Act 7).

31. Cal. Fam. Code § 3101 (West, WESTLAW through 1997-98 Reg. Sess. and 1st Ex. Sess.); 750 Ill. Comp. Stat. 5/607 (West, WESTLAW through P.A. 91-6, apv. 5/28/1999); La. Civ. Code Ann. art. 136 (West, WESTLAW through all 1998 1st Ex. Sess. and Reg. Sess. Acts); Tenn. Code Ann. § 36-6-303 (WESTLAW through 1998 Reg. Sess.); Wis. Stat. Ann. § 767.245 (West through 1999, Act 7).

siblings,[32] and relatives,[33] or persons who have either maintained a parent-child relationship with the child or who once had physical custody of the child.[34] Only a few states, in addition to Washington, allow *any* person to join or initiate an action for visitation.[35] In all, at least twenty-one state statutes specifically allow persons in addition to grandparents to petition for visitation. Finally, even in states where there is no statutory grant of standing to other third parties, many courts have exercised their discretion to grant visitation to third parties when it would be in the best interest of the child[36]

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32. 750 Ill. Comp. Stat. 5/607 (West, WESTLAW through P.A. 91-6, apv. 5/28/1999); La. Rev. Stat. Ann. § 9:344 (West, WESTLAW through all 1998 1st Ex.Sess. and Reg. Sess. Acts); N.J. Stat. Ann. § 9:2-7.1 (WESTLAW through L. 1999); R.I. Gen. Laws § 15-5-24.3(b) (West, WESTLAW through 1999 Reg. Sess.).

33. La. Rev. Stat. Ann. § 9:344 (West, WESTLAW through all 1998 1st Ex.Sess. and Reg. Sess. Acts); Ohio Rev. Code Ann. §§ 3109.051 (West, WESTLAW through 1999 portion of 123rd G.A.).

34. W. Va. Code §§ 48-2B-2 to -6 (LEXIS, WESTLAW through 1999 2nd Ex. Sess.); Wis. Stat. Ann. § 767.245 (West through 1999, Act 7).

35. Conn. Gen. Stat. Ann. § 46b-59 (West WESTLAW through Gen. St., Rev. to 1-1-99); Del. Code Ann. tit. 10, § 1031(7) (WESTLAW through 1998 Reg. Sess.); Minn. Stat. Ann. § 257.022 (West, WESTLAW through 1998 1st Sp. Sess.); Ohio Rev. Code Ann. §§ 3109.051 (West, WESTLAW through 1999 portion of 123rd G.A.).

36. *See, e.g., Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. App. 1980); *Evans v. Evans*, 302 Md. 334, 488 A.2d 157 (Md. 1985); *Looper v. McManus*, 581 P.2d 487 (Okla. Ct. App. 1978); *Honaker v. Burnside*, 388 S.E.2d 322 (W. Va. 1989).

and/or when the third party has stood in loco parentis to the child.[37]

In addition to experimentation at the state level, the American Law Institute (hereinafter ALI) is in the process of drafting "principles" that address the issue of visitation rights for extended family and informal kin in the context of dissolution of marriage. In its Principles of the Law of Family Dissolution, the ALI suggests that in an action in which the custody of a child is in issue, some non-parents should have a right to be notified and to participate as parties, but not to initiate the action.[38] Those eligible to participate are de facto parents, defined as persons who have resided with the child within the six-month period prior to the filing of the action, or who have maintained or tried to maintain the parental relationship since no longer living with the child, and adults who are allocated custodial or decision-making responsibility in a current parenting plan regarding the child. In addition, in "exceptional" cases, a court may, in its discretion, grant permission to participate to an "intervenor," who could be a grandparent or other third party, whose participation it determines is likely to serve the child's best interests. However, an intervenor, like a de facto parent or an adult with custodial responsibility, cannot initiate an action. In this way, the ALI recognizes the potentially valuable contributions of non-parents. The ongoing activity of the ALI

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37. *See, e.g., In re Marriage of Dureno*, 854 P.2d 1352 (Colo. Ct. App. 1992), *cert. denied*, 1993 Colo. Lexis 584 (Colo. July 6, 1993); *Hickenbottom v. Hickenbottom*, 477 N.W.2d 8 (Neb. 1991); *Spells v. Spells*, 378 A.2d 879, 250 Pa. Super. 168 (Pa. Super. Ct. 1977).

38. American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.04 (Tentative Draft No. 3, 1998).

and in state courts and legislatures is evidence of the complexity of the issues and suggests that the Court should tread cautiously in this area, allowing development of policies and practices at the state level.

CONCLUSION

The Center for Children's Policy Practice & Research respectfully requests that the Court affirm the decision below, on the ground that the Washington statute, as interpreted by the Washington Supreme Court, is so broad and vague as to subject the family to intrusion from virtual strangers. The Washington Court acted properly by instructing its legislature to clarify the sweep of the law.

However, we respectfully urge the Court to avoid suggesting, in its holding or its discussion of this case, that the Constitution ordains a fixed priority of rights among family members or that the state infringes parental rights by seeking to protect children's extended family and informal kin relationships. Such a holding would cast doubt on current child welfare policies and practices intended to enhance family autonomy and avoid the necessity of children being raised by the state instead of by their own families.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE VISITATION OF NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, MINORS, JENIFER AND GARY TROXEL

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

1. Does the award of a visitation order solely on the dispositional standard of the best interest of the child without requiring a threshold finding of unfitness violate a parent's right to procedural due process?

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INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights, including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential-

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

not because they are ancient and deserve veneration, but because they were the elected representatives of the people. Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people when they proposed and ratified the Constitution. Those promises are what is ultimately at stake in this case.

SUMMARY OF ARGUMENT

A Washington State statute provides that "any person may petition the court for visitation rights at any time." . The court may order such visitation if it is determined to be in the "best interests of the child." RCW 26.10.160(3).

The legislature had created strict standing requirements when third parties sought custody of children.[2] Pursuant to this section, petitions for third party custody require a showing of parental unfitness or that the child is not in the custody of one of the parents. The Washington Court of Appeals ruled that this same rule of standing had to be superimposed over the plain language of the visitation statute.[3] The court held that this judicial construction—amounting to an amendment—"is consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the 'care, custody, and management' of their children."[4] After so

[2] RCW 26.10.030(1)

[3] *In re visitation of Troxel*, 87 Wash. App. 131, 940 P.2d 698 (1997)

[4] *Id.* at 87 Wash.App. at 135, 940 P.2d at 800.

construing the statute, the Court of Appeals held that the grandparents of the children lacked standing to seek visitation because there was no allegation of parental unfitness or lack of parental custody.

The Supreme Court of Washington reversed the Court of Appeals on the issue of standing. The higher court held that the legislation should be interpreted according to its plain language.[5] Grandparents met the requirement of being "any person" and thus, their standing to file the visitation petition was clear.

However, the state supreme court found the visitation statute an unconstitutional interference with parental rights. Armed with the precedents of this Court which repeatedly hold that the right of parents to direct the upbringing and education of their children is a fundamental right,[6] the court employed the compelling

[5] *In re custody of Smith*, 137 Wash. 2d 1, 11-12, 969 P.2d 21 (1998).

[6] See, e.g. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) ("The Fourteenth Amendment guarantees the right of the individual . . . to establish a home and bring up children"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) ("the liberty of parents and guardians to direct the upbringing and education of children . . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right and the high duty, to recognize and prepare him for additional obligations"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential'"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This case involves the fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children . . . . This primary role of the parents in the upbringing of their children is now established beyond debate"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("freedom of personal choice in matters of family

interest test to find the statute unconstitutional. The core fault of the statute, the court held, was the failure of the visitation statute to require a predicate proof of harm to the child before involving the jurisdiction of the court.

The grandparents successfully petitioned this Court for certiorari arguing that the state supreme court had applied the wrong level of scrutiny to a case of parental rights.

Your amicus is fully dedicated to the preservation of parental rights as deserving the highest level of constitutional protection. Nonetheless, a dedication to the original intent of the Constitution troubles us concerning the use of the theory of "substantive due process" as the textual source for this right.

This Court should, in our opinion, soon undertake a thorough review of the whole doctrine of unenumerated

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life is a fundamental liberty interest protected by the 14th Amendment"); *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) ("We have long held that there exists a 'private realm of family life which the state cannot enter'"). See also; *Farrington v. Tokushige*, 273 U.S. 284, 298, (1927), *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), *Paris Adult Theater v. Slaton*, 413 U.S. 49, 65 (1973), *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977), *Maher v. Roe*, 432 U.S. 464, 476-479 (1977), *Parham v. J.R.*, 442 U.S. 584, 602-606 (1979), *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416, 461 (1983), *Lehr v. Robertson*, 463 U.S. 248, 257-258 (1983), *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986), *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987), *Michael H. v. Gerald*, 491 U.S. 110, 112 (1989), *Employment Division of Oregon v. Smith*, 494 U.S. 872, 881 (1990), *H.L. v. Matheson*, 450 U.S. 398, 410 (1991), *Vernonia School District v. Acton*, 515 U.S. 646, 654 (1995).

rights to ascertain an historically correct theory for their recognition. Such a review would necessarily involve more topics than parental rights. The whole field of "reproductive rights" would headline the list of issues, which would be affected by such a review. Your amicus would hope that the result of such review would be that those rights grounded in the history of this Republic at the time of the adoption of the relevant constitutional provisions would survive, and those rights not so grounded would be abandoned. Parental rights, we suggest, would thrive under this standard.

However interesting these issues may be, this is not the right case for resolving these difficult questions. We respectfully suggest that the proper resolution of this case is found in the time-honored principles of *procedural* due process. This approach fully protects both the rights of the parents and the original intent of the Constitution.

The state law is unconstitutional because it allows a dispositional standard ("the best interest of the child") to be employed without the necessity of a predicate factual finding that the parents had failed or forfeited their parental duties. The Due Process Clause requires this predicate finding before invading the parental liberty just as surely as it requires a finding of delinquency before a juvenile court may make dispositional orders "in the best interests of the child." These are procedural rights of parents which cannot be constitutionally ignored.

The Due Process Clause prohibits court removal of one's property without a predicate finding that a claimant is entitled to the possession of the goods. Due process prohibits criminal sentencing unless there has been a prior determination of guilt. Due process requires finding of parental unfitness prior to the loss of custody of one's

child. So too, due process requires a finding of parental fault as a predicate to the invocation of a court's jurisdiction to assign visitation rights to some third party.

This procedural right of parents was fixed in history at the time of the adoption of the 14th Amendment. Accordingly, this understanding of the Due Process Clause is fully consistent with the original intent of the Constitution.

ARGUMENT

I.

THE HISTORY OF THE "BEST INTERESTS OF THE CHILD" STANDARD DEMONSTRATES THAT IT IS A DISPOSITIONAL STANDARD USED BY COURTS OF EQUITY TO SUPERVISE WARDS OF THE COURT

A review of the case law which predates the adoption of the 14th Amendment demonstrates that it was universally understood that a child had to be made a ward of the court before a court was empowered to employ its discretionary power to make orders it believed to be in the best interests of the child.[7]

[7] The legislative history of state sodomy laws contemporaneous to the adoption of the Bill of Rights and the 14th Amendment was viewed as an appropriate method for determining the intent of the Framers of that Amendment relative to a substantive due process claim in *Bowers v. Hardwick*, 478 U.S. 186, 192-194 (1986). Since the "best interests of the child" is essentially a judicial standard, we review the contemporaneous case law to determine the historical support for the procedural due process principles we advance in this case.

One of the earliest cases was *Lawson v. Scott*, 9 Tenn. 92 (1825). In this case, Scott had fathered an illegitimate child born to a woman who had later married a Mr. Lawson. Without notice to Mrs. Lawson, he obtained a court decree establishing his paternity. Lawson subsequently filed a petition to obtain custody of his daughter who was about four years old. The trial court granted him custody on the basis of a state statue that the father was automatically entitled to the custody of his child absent a showing of unfitness. The Supreme Court of Tennessee, reversed, and held that the mother's common law right to the custody of a child born out of wedlock could not be ignored.

Importantly, the court used an analogy from another Tennessee statute that allowed courts to appoint guardians for children whose fathers had died. Such guardians would then be allowed to sign a contract binding the child to an apprenticeship. This statute ignored the rights of the mother—leaving her out of the process. The court held that it was insufficient to find that the child was an orphan (vis-à-vis the father) and without personal estate because such a law overlooked the ability of the mother to care for the child from her own estate. Before a court could appoint such a guardian and make the child a ward of the court; "[a]nother fact must appear, to give the county court jurisdiction over the child. It must be a pauper." Only after proof of the inability of the mother to care for the minor could the jurisdiction of the court be invoked to act for the child's best interests.

In a federal case from the same year, the district court of Maine recognized that parents have the right to the custody of their children which cannot be overridden without a showing that the parents have "waived or renounced" their rights. *Steele v. Thacher*, 22 F.Cas. 1204,

1 Ware 85 (D.Me. 1825). The court specifically addressed the issue of third party claims to the custody of children. "A stranger who violently or clandestinely withdraws the child from the parent's authority, and appropriates to himself the fruits of the child's industry, does a wrong to the parent for which the law will give him an appropriate remedy." *Id.* at 1207.

The process of declaring a child a ward of the court as a necessary predicate to invasion of the parental right to custody of their children was explicitly recognized by the Supreme Court of Illinois in *Cowls v. Cowls,* 8 Ill. 435 (1846).

> While a father so conducts himself as not to violate this right [of a child to not be abused, defrauded, or neglected], the court will not, ordinarily, interfere with his parental control. If, however, by his neglect or his abuse, he shows himself devoid of that affection, which is supposed to qualify him better than any other to take charge of his own offspring, the court may interfere, and take the infant under its own charge, and place it in the custody of a proper person to act as a guardian, who may be a stranger..... Infants thus taken under the charge of the court of chancery for the protection of their persons or property, are called wards of the court...." *Id* at 438.

When the court has the predicate jurisdiction over the person of the children, "no certain

> rule can be laid down for the government of the court in all cases, except that the best interests of the child must be consulted." *Id* at 445.

The Supreme Court of Massachusetts invoked the "best interest of the child" standard to guide the appointment of a guardian for the orphan of a civil war soldier whose wife had predeceased him. *Wardell v. Wardell*, 91 Mass. 518 (1865). Accordingly, *Biggs v. Harris*, 64 N.C. 413 (1870). Obviously, the Massachusetts case was decided just prior to the ratification of the 14th Amendment in 1868, and the North Carolina case immediately afterwards.

A father who had once abandoned his child petitioned a Pennsylvania court to reinstate his rights over the rights of the child's mother who had long cared for the child. The Supreme Court of Pennsylvania confirmed custody in the child's mother upon the theory that the father had abandoned his legal preference for custody. "Having been guilty of a violation of parental duty by his desertion and voluntary neglect of maintenance as proved by the record, he cannot stand on his mere legal rights as a father, but must satisfy the judge to whom he applies for restoration, that his application proceeds from proper motives and is for the best interests of the child." *Demot v. Commonwealth of Pennsylvania*, 64 Pa. 302 , 305 (1870).

A similar reasoning was announced just eight years after the adoption of the 14th Amendment by the Supreme Court of Illinois which directly held that the natural rights of the father to custody of his children become subject to a court's discretionary power "whenever a father becomes subject to the jurisdiction of the court, in a proceeding for a divorce." *Hewitt v. Long*, 76 Ill. 399 (1875).

Thus, there is an unbroken line of this historical understanding both before and immediately after the adoption of the 14th Amendment. A parent's right to the custody of his child could not be invaded by a court until there was proof of some circumstance which made the child a ward of the court or placed the parent under the jurisdiction of the court. If a parent died leaving an indigent child or divorced, or abandoned, neglected, or abused his or her child, then the child became a ward of the court. Then and only then could a court make orders that were designed to protect the best interest of the child.

II.

THE DECISIONS OF THIS COURT HAVE IDENTIFIED AND EMBRACED THE VIEW THAT THE "BEST INTERESTS OF THE CHILD" STANDARD CANNOT BE IMPOSED ON PARENTS ABSENT A SHOWING OF FAILURE

This Court has not previously determined whether the state may interfere with parental custodial rights on the sole basis of the best interest of the child.[8] Nonetheless, this Court has frequently embraced the essential aspects of the position that we advance in this case—that parental choices

[8] Such a law was before the Court in *Caban v. Mohammed*, 441 U.S. 380 (1979). A New York law gave an unwed mother an absolute right to block an adoption of her child absent a showing of parental unfitness. However, an unwed father could not block an adoption unless he could show that it would not be in the best interest of the child. There was no requirement for showing that he was unfit as a predicate to invoking the best interest standard. This Court ruled the statute unconstitutional on the basis of gender discrimination under the Equal Protection Clause and expressly reserved ruling on the due process issues advanced in this brief. See, 441 U.S., at 394, fn. 16.

may not be reviewed by the government to determine a child's best interest absent a prior finding that the parent is at fault or has defaulted in some manner. This was stated most clearly in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978):

> We have little doubt that the Due Process Clause would be offended "[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (STEWART, J., concurring in judgment).

In *Reno v. Flores*, 507 U.S. 292, 304 (1993), this Court said:

> "[T]he best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.

In other words, until there has been finding that a parent has failed to provide "certain minimum requirements of child care" the government is precluded from substituting its view of what is best for a child.

This Court explicitly noted the proper use of the "best interest of the child" standard as a *dispositional* rule which only follows a fact-finding determination of fault:

At the fact-finding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. See Fam. Ct. Act § 631 (judge shall make his order "solely on the basis of the best interests of the child, "and thus has no obligation to consider the natural parents' rights in electing dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the fact-finding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

Santosky v. Kramer, 455 U.S. 745, 760-761 (1982). See also, *Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("[A]bsent a finding of neglect or abuse. . . the traditional presumption that the parents act in the best interests of their child should apply.")

The danger of allowing judges to review parental decisions solely on the best interests of the child standard was strongly voiced in *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 835 (1977): "Moreover, judges too may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." While there is greater tolerance for vagueness with respect to dispositional matters which inherently involve judicial discretion, use of this term as the sole adjudicatory criteria is deeply troublesome to the values of the Due Process Clause.

In the context of our advocacy for the original intent of the Constitution, this review of this Court's decisions is not made for the purpose of demonstrating that this Court's precedents control the outcome of this litigation—although this is clearly the normally applicable rule. Rather, we raise these precedents in this brief to demonstrate the deep roots of the principles of procedural due process that are at issue. If this Court's precedents are out of line with the original intent, we contend that the original intent should nonetheless prevail. However, in this case there is no dissonance between original intent and this Court's precedents. The original intent of the 14th Amendment Due Process Clause, which has been demonstrated by the case law contemporaneous with its adoption, reflects exactly the same principles as this Court's current modern precedents.

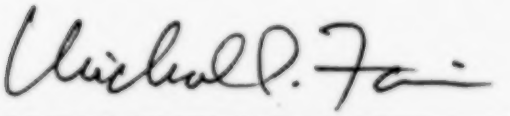
CONCLUSION

The Washington law in question gives all persons the right to petition for visitation rights with any child. No showing of parental unfitness is required. If a petition is filed, the law skips straight to the dispositional phase. The trial court is directed by the law to employ its own discretionary views over this visitation request.

Skipping to the dispositional phase without a prior showing of parental fault or unfitness violates the time-honored principles of *procedural* due process which were intended to be protected by the drafters of the 14th Amendment.

The decision below should be affirmed.

Respectfully Submitted,



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In The

SUPREME COURT OF THE UNITED STATES

November Term 1999

In The Matter of the Visitation of

NATALIE ANNE TROXEL AND
ISABELLE ROSE TROXEL, Minors,

JENNIFER AND GARY TROXEL,
Petitioners,

v.

TOMMIE GRANVILLE,
Respondent.

On Writ of Certiorari to the
Supreme Court of Washington

BRIEF FOR THE GRANDPARENT CAREGIVER LAW CENTER OF THE BROOKDALE CENTER ON AGING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE* [1]

The Grandparent Caregiver Law Center of the Brookdale Center on Aging of Hunter College of the City University of New York is a not-for-profit legal support center for grandparents who are the sole caregivers of their grandchildren in the absence of the children's parents. The interdisciplinary center offers the caregiving grandparents guidance and information on custodial issues and income and health care benefits that facilitates their ability to care for needy youngsters who have lost their parents as a result of death, illness, incarceration, or substance abuse. The Center's objectives include training of social workers, educators, school administrators, and other advocates who come in contact with caregiving grandparents and engaging in administrative and legislative reform. The Grandparent Caregiver Law Center is affiliated with the Citywide Kincare Task Force in New York City.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that no party other than counsel for *amicus curiae* authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. The petitioner and respondent have consented to the filing of the brief, and *amicus* has filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

STATUTES INVOLVED

The Washington statutes in question in this visitation petition are:

Former Revised Code of Washington 26.09.240 which provides:

"The court may order visitation rights for *a person other than a parent when visitation may serve the best interests of the child* whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child." (Emphasis added.)

And Revised Code of Washington 26.10.160(3) which provides:

"Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for *any person when visitation may serve the best interests of the child* whether or not there has been any change of circumstances." (Emphasis added.)

SUMMARY OF ARGUMENT

Children depend on role models in their formative years to develop well-rounded personalities and the absence of role models can have profound consequences for the emotional stability of children. This justifies Washington State's determination that the forcible loss of important relationships between children and other persons is a harm that the State may seek to prevent. Considering the realities of family life, it is reasonable for states to decide to include all persons among those whose contacts with children merit this protection. In providing this protection, the use of the best interests test allows courts to reach fair outcomes that adequately consider the interests of all the parties. Therefore, the Washington statutes in question are a permissible use of state power.

ARGUMENT

!. PREVENTION OF THE SERIOUS HARM TO CHILDREN INHERENT IN VISITATION DISPUTES IS A COMPELLING STATE INTEREST

Because of the potential for serious psychological harm to children, there no longer is room in our jurisprudence for parents to maintain total hegemony over who may visit their children. After divorce or the death of one parent, the remaining parent, who had shared child rearing with others, sometimes forcibly ends the child's contact with them. In these and other similar situations, parents' interests should be subordinated to the interests of their children. Almost forty

percent of the nation's families do not contain two parents.[2] Over five million children live in households where a grandparent is present.[3] Over two million of these grandparents are primary caregivers for children.[4] Millions of other grandparents are involved in the raising of their grandchildren. In addition, the present day variations in family arrangements seem boundless. In this fluid diversity of persons with ties to children, the only remaining constant is the children's interests. Unless the Washington statutes are found to be constitutional, the daily court interventions in family life will be rendered invalid, and the already torn fabric of family unity will be ripped to shreds by an inappropriate partiality that fails to protect family life by catering to one remnant of the family.

Even if the Washington Supreme Court rightly decided that the constitutionally protected interests of parents was at stake, the Washington statutes would still survive heightened scrutiny because the state has a compelling state interest in the prevention of a serious harm to children – the harm that comes

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[2] Ariel Halpern et al, *Snapshots of America's Families* [hereinafter *Snapshots of the American Family*], at *Children's Environment and Behavior*, C-2 (Urban Institute, 1999). Sixty-three percent of families are two parent families. This figure includes families where one or both parents are adoptive parents or where both parents are adoptive parents.

[3] Ken Bryson and Lynne Caspar, *Nearly 5.5 Million Children Live with Grandparents*, (Census Bureau Reports, July 1, 1999).

[4] United States Department of Health and Human Services, Administration on Aging, National Aging Information Center, www.aoa.dhhs.

when children are forcibly separated from a loved one.[5]

The harm which Washington State seeks to prevent in the present case (the finality of the loss of a loving relationship with grandparents) can reasonably be considered of greater magnitude than the harm prevented in *Prince v. Massachusetts*.[6] In addition, the prevention of the loss of a substantial relationship with a person who has much to contribute to the maturation of a young child is worthy of state protection because of its potential for another harm – the substantial social burden caused by a child's being brought up without adequate role models.[7]

Families end up in family courts because they are in trouble. When family relations have deteriorated to the point where parents seek to ostracize relatives (or other caregivers),

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[5] In a court's initial application of a best interests analysis, the person being deprived of visitation must necessarily show some unsatisfactory condition related to the child; *i.e.*, some harm, such as the loss of a substantial beneficial relationship, is required in order to overcome the burdensome weight that a court proceeding (and an award of visitation) would place on the parents and the children. For example, New York's grandparent visitation statute, Domestic Relations Law. § 72 (McKinney Supp. 1999), places no restriction on the opportunity for grandparents to seek visitation when each or both parents are dead or when "conditions exist where equity would see fit to intervene". Nevertheless, New York's case law has developed the requirement that there be a substantial relationship with a child or that attempts to establish such a relationship were thwarted by the parent(s) before a court may intervene. *See, Matter of Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 573 N.Y.S.2d 36, 577 N.E.2d 27 (1991).

[6] The selling of magazines in a public place, *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 8 L. Ed. 645 (1944).

[7] "If it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens". *Wisconsin v. Yoder*, 406 U.S. 205, 230, 92 S. Ct. 1526, _, 32 L. Ed 2d 15, _ (1972).

a dire situation already exists that has gone beyond the point of dialogue. The ostracization will seriously affect all members of that family for the rest of their lives. This conclusion does not need a reference to a scientific source. Humankind commonly knows it. It is the very stuff from which childhood emotional trauma is made. It is the type of loss that can be unbearable when caused by death, geographical relocation, or willful disengagement, but which seems irreconcilable for a child whose mother or father instigated it. Because the permanent forced cessation of loving relationships with children is such a drastic act, states are justified in considering it "inherently harmful".

The grandparents' petition here, like other petitions for visitation, does not rest on an assertion of a fundamental right, but rather, rests on a combination of harms and "family" interests that is founded in our paramount interest in a child's welfare and our traditional recognition of both nuclear and extended families.[8] This combination of serious harm and family interests gives the state a compelling reason to provide the opportunity for non-parents to keep beneficial relationships with children, despite some intrusion upon nuclear families. In the end, the grandparents' claim is stronger because it is based on the reality of family life, and prevents the forced separation of children from those who have participated substantially in their nurturing.

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[8] *Moore v. City of East Cleveland*, 431 U.S. 494, 506, 97 S. Ct. 1932, 1939-40, 52 L. Ed. 531, _ (1977).

II. TO PERMIT "ANY PERSON" TO PETITION FOR VISITATION IS A REASONABLE USE OF STATE POWER

To decide that the loss of contact with only a certain class of persons merits prevention will fail to protect a substantial number of children. The intact nuclear family is approaching minority status - less than sixty-three percent of families contain two parents.[9] This fact forces judges and legislatures to reconsider laws concerning the definition of family and the protections and responsibilities placed upon them. For instance, Indiana has created a "De Facto Custodian" law that defines a de facto custodian as a primary caregiver and financial supporter of a child, if the child is under three years old and has lived with that person for at least six months, or if the child is over three years old and has lived with that person for more than one year. A de facto custodian has the same legal standing as a parent in a custody dispute.[10]

Once the traditional parameters of biological parents and their children is crossed, it is not a simple task to define who should be excluded from the family.[11] Faced with this

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[9] *Snapshots of America's Families*, at *Children's Environment and Behavior*, C-1. This percentile contains families with one natural and one adoptive parent families and those with two adoptive parents, so the actual percentile of families with two natural parents is still lower.

[10] Indiana H.B. 1445, (effective July 1999).

[11] Within the societal and constitutional tradition of protecting the family unit, what members of a family are protected appears to change with the interest that warrants protection. In *Michael H. et al v. Gerald D.*, 491 U.S. 110, 125, S. Ct. 2333, 2343, 105 L. Ed. 2d 91, _, (1989), the family could not "be stretched so far as to include a relationship" between the biological father, the mother, and the child. In other instances, the protection accorded the family unit extended beyond the marital family: to

task, states can decide that their state interest in protecting families is reasonably served by a classification that does not identify a particular group of family members, but chooses to include all possible persons as family members, whether related or non-related, so long as their interests are subordinate to the best interests of the child.

To do otherwise, would risk the loss of important sources of emotional stability for children. Such sources might include: other children and young adults who grew up with children; unrelated persons or aunts and uncles with whom children had lived for a substantial part of their lives; uncles who provided a paternal relationship for fatherless children; great-grandparents; and parents of deceased mothers whose children are in the custody of fathers who abused the children's mother.

Another example of the loss of important sources of emotional stability occurs when young unwed mothers rely on third parties (grandparents, relatives, or others) to assist in child rearing. This arrangement frequently continues until the mothers form new relationships with males who want the third parties excluded.[12] The persons, who were the primary caregivers for a substantial part of the children's lives, and the

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a grandmother and her two grandsons, *Moore v. City of East Cleveland*, 431 U.S. at 493; to an aunt and niece, *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 8 L. Ed. 645 (1944); and to a non-marital father, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) and *Caban v. Mohammed*, 441 U.S. 380 (1979), 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).

[12] Thirty-two percent of all U.S. births are to unmarried women. *Snapshots of America's Families*, at *Children's Environment and Behavior*, C-2. This figure does not include children who are born to a married couple but are raised by a single parent or a third party.

children find themselves forbidden from contacting each other.[13] In a significant number of these and other instances, parents simply lack the emotional maturity to care for children,[14] and their children are left without anyone who can provide them with emotional stability.

Under these realities of family life, it is reasonable for the Washington legislature to decide to provide protection to any persons whose visits with the children would serve the children's best interests. By providing such an opportunity, Washington's legislature chose to protect the de facto family unit's relationships and to intervene in these intra-family disputes only when necessary to preserve the common "family" interest in the welfare of children.

III. THE BEST INTERESTS TEST REACHES FAIR OUTCOMES

The use of the best interests standard offers the broadest avenue to reach fair outcomes. In *Michael H. et al v. Gerald D.*, 491 U.S. at 134, Justice Stevens, writing a concurring opinion, relied on California Civil Code Annotated § 4601(West Supp. 1989) as the foundation of his opinion. In quoting the statute, Justice Stevens emphasized the language of the California statute which is similar to that of the Washington statutes in question here:

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[13] In many instances, grandparents have been the caregivers. Ken Bryson and Lynne Caspar, *Nearly 5.5 Million Children Live with Grandparents*, (Census Bureau Reports, July 1, 1999).

[14] "Nationally, 9 percent of all children lived with a parent who felt highly aggravated". *Snapshots of America's Families*, at *Adult's Environment and Behavior*, D-2.

" '[R]easonable visitation rights [shall be awarded] unless it is shown that the visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted *to any other person having an interest in the welfare of the child.*' (Emphasis added.)."

Michael H. v. Gerald D., 491 U.S. at 134.

Justice Stevens' concurring opinion in *Michael H. v. Gerald D.*, while assuming that a constitutional due process right exists and is available to the biological father who had sought visitation, found that right to be fairly protected by Cal. Civ. Code § 4601. Justice Stevens wrote, "Because I am convinced that the trial judge had the authority under state law both to hear Michael's plea for visitation rights and to grant him such rights if Victoria's best interests so warranted, I am satisfied that the California statutory scheme is consistent with the Due Process Clause of the Fourteenth Amendment". *Michael H. v. Gerald D.*, 491 U.S. at 137. The fundamental fairness of the best interests test invoked by Justice Stevens in the California case applies equally to the best interest of the child standard in the Washington State case. Just as the natural father's assumed liberty interest was accorded adequate protection within the best interests analysis of the California trial court under Cal. Civ. Code. § 4601, *Michael H. v. Gerald D.*, U.S. 110 at 134-35, so too, are the parents' interests protected under the Washington statutes.

Moreover, the hearing of such a dispute falls within the equity powers of any court charged with resolving

family disputes.[15] If courts of equity may award visitation without a legislative grant of power, a statutory embodiment of this power is not beyond a state's power.

Here, where conflicting harms are so personal in nature, the best interests test provides the finest tool for allowing the court to focus on the persons most likely to be injured – the children. Its use protects them from the loss of meaningful relationships that may offer the only solace to children caught within troubled families

CONCLUSION

For the foregoing reasons, the Grandparent Caregiver Law Center of the Brookdale Center on Aging urges this Court to correct the constitutional error in the decision below. The Court should reverse the judgment of the Washington State Supreme Court and remand the case with directions to grant the grandparents reasonable visitation with their grandchildren.

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[15] *Custody of Smith*, 137 Wash. 2d at 36, citing *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478 (1985). *See also* the dissent in *Shriver v. Shriver*, 7 Ohio App.2d 169, 174, 219 N.E.2d 300, 303 (1966). "[T]he privilege of visitation, which the Common Pleas Court, in a proper case, in the exercise of its equity powers and judicial discretion, grants".

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IN THE
Supreme Court of the United States

IN THE MATTER OF THE VISITATION OF NATALIE ANN TROXEL AND ISABELLE ROSE TROXEL, MINORS, JENIFER AND GARY TROXEL,
Petitioners,
v.
TOMMIE GRANVILLE,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Fourteenth Amendment liberty interest in parental autonomy prohibits a State from granting a grandparent visitation with a grandchild when it serves the best interests of the child.

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IN THE

Supreme Court of the United States

No. 99-138

IN THE MATTER OF THE VISITATION OF NATALIE ANN TROXEL AND ISABELLE ROSE TROXEL, MINORS, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or

The Court has long recognized that "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593 (1890). In response to such phenomena as rising divorce and illegitimacy rates, all fifty States have enacted third-party visitation statutes under which a child's grandparents can petition for visitation rights under certain circumstances. *See* Richard S. Victor *et al.*, *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 Fam L.Q. 19, 22 (1991). These statutes commonly require that the person seeking visitation rights establish that visitation is in the "best interest of the child." *See id. at* 22-23, 26-51.

While the Court has held that the Due Process Clause provides a parental liberty interest in "bring[ing] up children," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the scope of this interest has not been precisely defined. The Court's cases establish, however, that where state regulation of this interest does not impinge upon some other constitutional right, it is valid if it has a "reasonable relation to any end within the competency of the state." *Id.* at 403. That all 50 States have enacted similar statutes demonstrates that it is not arbitrary or irrational to grant grandparents the statutory right to petition for visitation with their grandchild.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

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entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Natalie Anne Troxel, who is ten years old, and Isabelle Rose Troxel, who is almost eight, are the children of Brad Troxel and Tommie Granville, and the grandchildren of Jenifer and Gary Troxel ("the Troxels"). Pet. App. 2a, 55a, 73a. Brad and Tommie were not married, and their relationship ended in June 1991, when Natalie was one and a half years old and six months prior to Isabelle's birth. Pet. App. 55a, 73a. After Brad and Tommie's separation, Brad lived with his parents and "regularly brought Natalie and Isabelle to [their grandparents'] house for weekend visitation." *Id.* at 55a.

Brad committed suicide in May 1993. *Id.* Thereafter, "the Troxels saw Natalie and Isabelle regularly, though the girls did not stay overnight at the Troxel residence." *Id.* at 56a. In October 1993, Granville "informed the Troxels that she wished to limit visitation to one short visit per month." *Id.* The Troxels did not agree to this and did not see Natalie and Isabelle at all between October and December 1993. *Id.*

In December 1993, the Troxels commenced this action under R.C.W. § 26.10.160(3), seeking court-ordered visitation with their granddaughters. Pet. App. 56a. The trial on the Troxels' visitation petition was held in December 1994; the court made the following findings:

> [The Troxels] are part of a large, central, loving family, all located in this area, and [the Troxels] can provide opportunities for the children in the areas of cousins and music . . . . The children would be benefited from spending quality time with [the Troxels], provided that that time is balanced with time with the children's nuclear family. The court finds that the children's best interests are served by spending time with their mother and stepfather's other six children.

Id. at 74a.

The Troxels petitioned for "two weekends of overnight visitation per month and two weeks of visitation during the summer." *Id.* at 56a. Based on the evidence, the trial court entered a visitation decree providing for visitation of approximately one weekend day per month (from 4:30 p.m. on Saturday to 6:00 p.m. on Sunday), one week in the summer, and four hours on each girl's birthday. *Id.* at 56a, 75a, 77a-78a.

SUMMARY OF ARGUMENT

1. The Court has recognized a liberty interest under the Due Process Clause in parents to "establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court has explained that "[t]he established doctrine is that this liberty may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Id.* at 400.

The Court has not precisely defined the contours of this liberty interest. The Court's cases make clear, however, that the scope of protection granted this interest depends upon the degree to which the State is impinging on a constitutional right. As *Wisconsin v. Yoder* explained, "when the interests of parenthood are combined with a free exercise claim . . . more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State's requirement under the First Amendment." 406 U.S. 205, 223 (1972) (internal quotation omitted). Absent infringement of some other constitutional right, state action which implicates the parental liberty interest in bringing up children must be sustained if it has a "reasonable relation to some purpose within the competency of the State." *Id.* at 233 (citation and quotation omitted).

2. The Washington Supreme Court erred in subjecting the State's third-party visitation statute to strict scrutiny. Contrary to the reasoning of the lower court, where no fundamental right is implicated the State is not limited to acting only to protect children from harm. Granting grandparents the statutory right to petition for visitation is simply an exercise of the State's traditional authority to establish the law of domestic relations. " 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.' " *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). A state law regulating domestic relations is thus subject to review under the Due Process Clause only in the same sense that any state law is reviewable for arbitrariness or irrationality. The Court has been "reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The exercise of restraint is especially necessary in an area which, since the founding, has been the exclusive province of the States. There is simply no clear and substantial federal interest which justifies subjecting the statute to scrutiny under a standard more onerous than rational basis review.

3. Washington's visitation statute is reasonably related to the State's regulation of domestic relations. Washington's legislature, like those of the other forty-nine States, has recognized that the family unit is not limited to the traditional nuclear family and that persons such as grandparents can also properly be deemed part of the family. With an estimated 40 to 50 percent of all children expected to experience their parents' divorce, and 32 percent of children born out of wedlock, the States, in enacting

grandparent visitation statutes, have responded to the reality of modern life. That reality is that grandparents frequently take on major responsibilities in caring for the children, that grandparents play important roles in the lives of their grandchildren by serving as mentors, role models or family historians; that a grandparent's love for a grandchild is not conditioned on whether the child was born in wedlock and does not end with a divorce or death of a parent; and that parents have been known to renege, for unwarranted reasons, on their moral obligation to allow grandparent visitation. The States are entitled to recognize the interests of grandparent and grandchild in preserving their relationship, notwithstanding the objection of the parent.

Granting grandparents the statutory right to petition for visitation subject to showing that visitation "serves the best interest of the child," R.C.W. § 26.10.160(3), bears "a reasonable relation to some purpose that is within the competency of the State." *Meyer*, 262 U.S. at 400. Visitation is at most a minor interference with the parental liberty interest. Moreover, that the grandparent must prove that visitation serves the best interest of the child provides adequate protection against the arbitrary application of the statute. Under Washington law, a court may consider such factors as the strength of the relationship between the grandparent and grandchild, the nature of a parent's objection to granting visitation, and whether a petitioner has a history of criminality or abusive conduct. *See* R.C.W. § 26.09.240(6). Where a visitation statute provides such guidance to the trial court, it bears a "reasonable relation" to the State's interest in reconciling the rights of grandparent, parent, and child, and is thus not an "arbitrary" or "irrational" interference with the parental liberty interest in directing the upbringing of one's children.

ARGUMENT

THE FOURTEENTH AMENDMENT LIBERTY INTEREST IN PARENTAL AUTONOMY DOES NOT PROHIBIT A STATE FROM PROTECTING AN ESTABLISHED RELATIONSHIP BETWEEN A GRANDPARENT AND A GRANDCHILD WHICH IS IN THE BEST INTERESTS OF THE CHILD

The Washington Supreme Court erred in holding that the State's third-party visitation statute violates the Due Process Clause of the Fourteenth Amendment. In so holding, the court deemed the liberty interest in parental autonomy recognized by this Court to rise to the level of a fundamental right, thus requiring invalidation of the statute absent a showing that it serves "a compelling state interest and such interference is narrowly drawn to meet only the compelling state interest involved." Pet. App. 15a. It further concluded that the Fourteenth Amendment prohibits the State from acting only where the State can show "parental unfitness, harm or threatened harm" to a child. *Id.* at 16a.

This Court has long recognized that the Due Process Clause provides a parental liberty interest in "bring[ing] up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The scope of this liberty interest, however, has not been precisely defined. The Washington Supreme Court's holding breaks new ground, expanding substantive due process well beyond this Court's precedents and into the area of domestic relations, which has long been recognized as an exclusively state concern.

With the decline of the traditional nuclear family, all fifty state legislatures have recognized the important role that grandparents and other relatives can play within the family unit. That all fifty States have enacted statutes similar to Washington's demonstrates that there is nothing

arbitrary in granting visitation to grandparents who can show that such visitation is "in the best interests of the child." As these statutes demonstrate, whatever the scope of a parent's liberty interest to be free from arbitrary state interference in child-rearing decisions, there is no established tradition of denying visitation to a grandparent who has a significant relationship with a child where the visitation is in the best interests of a child. The States' unanimous recognition that with the decline of the traditional nuclear family grandparents and their grandchildren have substantial interests in preserving their established relationships should not be overturned on the basis of a constitutional provision which is silent on the matter.

A. A State Law Which Implicates Only The Liberty Interest In Parental Autonomy And Not Some Other Constitutional Right Is Subject To Review Only For Arbitrariness

In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), this Court first recognized that the substantive component of the Due Process Clause includes a liberty interest in parents to "establish a home and bring up children." The Court further explained that "[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Id.* at 400.

In *Meyer*, the Court overturned the conviction of a school teacher who violated a state law which prohibited the teaching of foreign languages to students who had not passed the eighth grade. *Id.* at 397. While the Court explained that the liberty guaranteed by the Fourteenth Amendment included the teacher's right "to teach and

the right of parents to engage him so to instruct their children," *id.* at 400, it did not apply strict scrutiny. Rather the Court recognized the patent arbitrariness of a statute which had been interpreted to allow the teaching of " 'so-called ancient or dead languages' " such as "Latin, Greek, [and] Hebrew," while "German, French, Spanish, Italian, and every other alien speech are within the ban." *Id.* at 400-01 (quoting *Nebraska Dist. Evangelical Luth. Synod v. McKelvie*, 187 N.W.2d 927 (Neb. 1922)). As the Court reasoned, "the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state." *Id.* at 403.

Two years later, the Court relied on the parental liberty interest in directing the education of their children to invalidate a state law which compelled public school attendance. *See Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). In *Pierce*, the Court reaffirmed that state laws which interfere with this liberty interest must have a "reasonable relation to some purpose that is within the competency of the State." 268 U.S. at 535. The Court explained that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public school teachers only." *Id.* The Court further stated: "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." [2]

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[2] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), went well beyond *Pierce* in invalidating a state law requiring school attendance up to the age of 16.

While the opinion in *Pierce* made no reference to the free exercise clause, appearing to decide the case solely on the basis of the Due Process Clause, the Court has subsequently explained that the case rested on "the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). And in *Wisconsin v. Yoder,* the Court explained *Pierce* in the following manner:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations."

406 U.S. at 214 (quoting 268 U.S. at 535); *see also id.* at 233 ("*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.").

Although the Court has recognized a parental liberty interest in bringing up children, the scope of protection granted that interest depends upon the degree to which the State is impinging on some other constitutional right. *See id.* ("[w]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment"). In *Prince,* the Court explained that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . .

[a]nd neither rights of religion nor rights of parenthood are beyond limitation." 321 U.S. at 166. The Court emphasized "that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Id.* at 167.

Thus, in *Prince* the Court upheld the application of a state child labor law to a "parent" who took a child in her custody with her when she distributed religious publications on a public street. *See id.* at 159-71. It did so notwithstanding that the "parent" raised claims based on both the Free Exercise Clause and the Due Process Clause. *See id.* at 164. Furthermore, it rejected the argument that the statute could not be applied "unless shown to be necessary for or conducive to the child's protection against some clear and present danger" and that "[t]he child's presence on the street, with her guardian, distributing . . . the magazines . . . was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited." *Id.* at 167. The Court acknowledged that "the presence of the child's guardian . . . may lessen the likelihood that some evils the legislation seeks to avert will occur." *Id.* at 169. The Court, however, found the regulation justified, reasoning that it is "wholly inappropriate for children, especially of tender years, to face" the situations which arise in the course of "propagandizing" and that the State could protect children from this as well as the "[o]ther harmful possibilities [that] could be stated, of emotional excitement and psychological or physical injury." *Id.* at 170.

The *Prince* Court's willingness to hypothesize potential justifications for the statute clearly refutes the Washington Supreme Court's conclusion that the liberty interest in parental autonomy is of such a magnitude that the visi-

tation statute can only be sustained if the State has "a compelling interest" and the statute "is narrowly drawn to meet" that interest. *See* Pet. App. 15a. Rather, the Court's holdings establish that where state action does not unduly burden a fundamental right beyond the parental liberty interest in bringing up children, it must be sustained if it has a " 'reasonable relation to some purpose within the competency of the State.' " *Yoder*, 406 U.S. at 533 (quoting *Pierce*, 268 U.S. at 534-35).[3] This is the appropriate standard to apply here where there is no allegation that Washington's visitation statute burdens some other constitutional right.

B. Regulating Domestic Relations Is A Longstanding Area Of State Authority

The Washington Supreme Court read this Court's precedents as limiting the State's power to intrude on the liberty interest in parental autonomy only where the State acts

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[3] In its attempt to define the nature of the liberty interest in parental autonomy, the Washington Supreme Court also relied on *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Stanley v. Illinois*, 405 U.S. 645 (1972). Neither case clarifies the scope of the interest nor supports the conclusion that the interest rises to the level of a fundamental right absent state interference with some other textually-based constitutional right. *Stanley* involved whether a State could presume an unwed father to be an unfit parent and deny him a hearing before taking his children away. *See* 405 U.S. at 646. Under the state law at issue in *Stanley*, neither unwed mothers or married fathers were presumed unfit and the State could not take custody of their children without a hearing establishing their lack of parental fitness. *See id.* at 650. The case raised issues of equal protection and procedural due process. *See* 405 U.S. at 657-58.

Santosky involved the evidentiary standard that a State must meet to establish the factual findings necessary to terminate parental rights. *See* 455 U.S. at 748-51. The case thus implicated procedural due process and is not relevant to the issue here. *See, e.g., id.* at 754, 758, 761 (discussing application of factors articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

pursuant to its "police power" or its "parens patriae" power. Pet. App. 15a-16a. In the lower court's view, the State could exercise its police and parens patriae powers to intrude on parental autonomy only where a parental decision "directly and severely imperiled the child," or "where a child has been harmed or where there is a threat of harm to a child." *Id.* at 16a. This view of the sources of state authority reads too much into this Court's cases and ignores the traditional state authority to establish the law of domestic relations.

Contrary to the views of the Washington Supreme Court, this Court's cases do not establish a broad principle that the State can only regulate parental autonomy in the interest of protecting children from harm. Indeed, the cases that are cited for that proposition—*Yoder*, *Prince*, and *Pierce*—all involved claims that state action intruded on both the liberty interest in parental autonomy and First Amendment rights. When First Amendment rights are implicated, the Court routinely applies a standard more onerous than rational basis review. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). The Court's repeated reaffirmation of the *Meyer* standard, which asks whether "the statute as applied is arbitrary and without reasonable relation *to any end* within the competency of the state," 262 U.S. at 403 (emphasis added), demonstrates that where state action implicates only the liberty interest in parental autonomy, the State is not limited to acting only to protect a child from harm. Indeed, were this not so it is doubtful whether the State could require that parents educate their children. *See Yoder*, 406 U.S. at 230 (describing case as "not one in which any harm to the physical or mental health of the child or to the public

safety, peace, order, or welfare has been demonstrated or may be properly inferred").

The Washington Supreme Court's holding thus ignores the longstanding authority of the States to regulate domestic relations. As the Chief Justice has explained, the area of "domestic relations . . . has been left to the States from time immemorial, and not without good reason." *Santosky*, 455 U.S. at 770 (Rehnquist, J., dissenting). "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements." *United States v. Yazell*, 382 U.S. 341, 352 (1966). Indeed, since at least *In re Burrus*, 136 U.S. 586, 593-94 (1890), the Court has recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *Accord Boggs v. Boggs*, 520 U.S. 833, 848 (1997).

In re Burrus involved a custody dispute between the maternal grandparents and father of a child. After the death of the child's mother, the maternal grandparents took custody and raised the child for seven years. In the interim the child's father remarried and demanded that the grandparents deliver the child to him. The father filed a petition for a writ of *habeas corpus* in federal district court seeking the return of the child. The district court granted the writ and the grandparents turned over the child to her father. 136 U.S. at 587-88.

The grandparents then followed the father and child on to their train, eventually took "possession of the child with violence and against the will of the father," and returned to their home. *Id.* at 588. Thereafter, the grandparents were ordered before the district court, which held them in contempt and sentenced the grandfather to three

months imprisonment. *Id.* at 588-89. The grandfather then challenged the jurisdiction of the district court to issue the writ and jail him for contempt. *Id.* at 589. This Court upheld the challenge stating:

> In the case before us there was no pretense that the child was restrained of its liberty, or that the grandfather withheld it from possession and control of the father, under or by virtue of any authority of the United States, or that his possession of the child was in violation of the constitution or any law or treaty of the United States. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and grandfather, it is one in regard to which neither the congress of the United States, nor any authority of the United States, has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of congress, or any treaty of the United States or its constitution.

136 U.S. at 593-94. *See also id.* at 596 ("the relations of the father and child are not matters governed by the laws of the United States").

Since *Burrus* the Court has repeatedly reaffirmed this principle. *See Boggs*, 520 U.S. at 848; *Rose v. Rose*, 481 U.S. 619, 625 (1987); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981); *Popovici v. Agler*, 280 U.S. 379, 383 (1930). And in preemption cases implicating the States' traditional authority over domestic relations, the Court has explained that "[s]tate family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden." *McCarty*, 453 U.S. at 220

(internal quotations and citations omitted); *see also Yazell*, 382 U.S. at 352 (state interests "in the field of family . . . arrangements . . . should be overridden only where clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied").

As the foregoing demonstrates, the subject matter of domestic relations law is constitutionally committed to the States. And as *Burrus* makes clear, the regulation of the relationship between grandparent, parent, and child is a matter which is "within the competency of the state." *Meyer*, 262 U.S. at 403. A state law regulating domestic relations is thus subject to review under the Due Process Clause only in the same sense that any state law is reviewable for arbitrariness or irrationality. The Court has been "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1993). The exercise of restraint is especially appropriate in an area which, since the founding, has been the exclusive province of the States. There is simply no "clear and substantial federal interest" which justifies subjecting the statute to scrutiny under a standard more onerous than rational basis review. *McCarty*, 453 U.S. at 220.

C. Washington's Statute Is Reasonably Related To The State's Interest In Regulating Domestic Relations

Washington's visitation statute is "reasonably related" to the State's regulation of domestic relations. Establishing the rules for granting visitation rights with a child is, of course, a core part of the regulation of domestic relations. *Cf. Burrus*, 136 U.S. at 593-94. In enacting its visitation statute, Washington, like the other 49 States which have enacted similar statutes, has recognized what

this Court did more than twenty years ago in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *i.e.*, that the family unit is not limited to the traditional nuclear family and that persons such as grandparents can also properly be deemed part of a family. As this Court observed in *Moore*, the Due Process Clause does not require "cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family." *Id.* at 502; *see also Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997) ("Grandparents are members of the extended family whom society recognizes as playing an important role in the lives of their grandchildren. . . .").

State legislatures are equally warranted in coming to the same conclusion with respect to their laws of domestic relations. Indeed, with an estimated 40 to 50 percent of all children expected to experience their parents' divorce, *see* Emmy E. Werner, "Grandparent-grandchild relationships amongst US ethnic groups," in *The Psychology of Grandparenthood—An International Perspective* 68, 73 (Peter K. Smith, ed., 1991), and 32 percent of children being born out of wedlock, U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1998* 81 (1998) (Table No. 101), the States, in enacting grandparent visitation statutes, have only responded to the reality of modern life. The reality is that grandparents (and other non-parental relatives) frequently "take on major responsibility for the rearing of the children," *Moore*, 431 U.S. at 505, even when they do not share the same household; that grandparents can play important roles in the lives of their grandchildren even when they do not have such responsibilities by serving as "mentor[s]," "role model[s]," or "family historian[s]," Werner, at 76; that grandparents' love for their

grandchild is not conditioned on whether the child was born in wedlock and does not end with a divorce or death of a parent; [4] and that parents have been known to renege, for unwarranted reasons, on their moral obligation to allow grandparent visitation.[5] The States are entitled to recognize [6] the bonafide interests of grandparent and

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[4] As one authority notes, "the results of a large study of pregnant adolescents yielded the information that the grandchild was universally esteemed in the family regardless of how the teen's parents felt about her pregnancy." Norma Radin *et al.*, "Grandfathers, teen mothers and children under two," in *The Psychology of Grandparenthood* 85, at 86.

[5] The latter is particularly the case between the custodial parent and the noncustodial grandparents. *See* Andrew J. Cherlin & Frank F. Furstenberg, Jr., *The New American Grandparent* 143-44 (1986) ("noncustodial grandparents were much more likely to report that they saw the child less often than before the marital problems began"). Moreover, "among all grandparents who were not living with the . . . child, non-custodial grandparents tended to see their grandchildren much less often than custodial grandparents." *Id.* at 146. In one study, one out of eight noncustodial grandparents "responded affirmatively to the question. 'Do you ever find that you don't spend as much time with [the child] as you would like because . . . either of [the child's] parents don't want you to see [him/her] more?'" *Id.* at 147.

Several studies have documented that "grandchildren tend to have more frequent contact with grandparents on the custodial parent's side than with those on the non-custodial parent's side. The fate of grandparent-grandchild relations following divorce is linked to the grandparent-parent relations which have evolved. . . ." Werner, "Grandparent-grandchild relationships," in *The Psychology of Grandparenthood* at 74.

[6] The Washington Supreme Court acknowledged "that in certain circumstances . . . arbitrarily depriving the child of the relationship could cause severe psychological harm to the child." Pet. App. 21a. It nonetheless invalidated the statute because the statute has "no threshold requirement of a finding of harm to the child as a result of the discontinuation of visitation." *Id.*

The State's authority to regulate the area of domestic relations is not, however, subject to the limitation that it can act only where there is a showing of harm. State courts routinely adjudicate child

grandchild in preserving their relationship notwithstanding the objection of the parent.

As the New Hampshire Supreme Court has explained:

> The realities of modern living . . . demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded . . . . More varied and complicated family situations arise as divorce, and decisions not to remarry, result in single-parent families; as remarriages create stepfamilies; as some parents abandon their children; as others give them to temporary caretakers; and as still others are judged unfit to raise their own children.
>
> One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal attachments between them and adults outside of their immediate families. Stepparents, foster parents, grandparents and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact. . . . It would be shortsighted indeed . . . not to recognize the realities and complexities of modern family life, by holding . . . that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family.

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custody and visitation disputes between parents based on the "best interest of the child" standard. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989).

In any event, a State can rationally conclude that where there is an established relationship between a grandparent and grandchild, severing that relationship can cause psychological harm to the child. While the former Washington statute did not require such a showing, it is clear that the Troxels had an established relationship with their grandchildren. *See* Pet. App. 55a-56a (opinion of the Washington Court of Appeals).

Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985). *See also Campbell v. Campbell*, 896 P.2d 635, 643 (Utah App. 1995); *Herndon v. Tuhey*, 857 S.W.2d 203, 209 (Mo. 1993).

Granting grandparents the statutory right to petition a court for visitation with a grandchild subject to the showing that visitation "serves the best interest of the child," R.C.W. § 26.10.160(3), bears "a reasonable relation to some purpose that is within the competency of the State." *Meyer*, 262 U.S. 400. As the dissenting opinion below observed, granting limited visitation rights is at most a "minor encroachment" on the parental liberty interest,[7] Pet. App. 31a, and it is thus not an unreasonable interference with parental autonomy rights. *See also Roberts*, 493 A.2d at 482 (quoting *Krieg v. Glassburn*, 419 N.E.2d 1015, 1019 (Ind. App. 1981) (" '[G]ranting visitation is a far lesser intrusion, or assertion of control, than is an award of custody' and thus not nearly as invasive of parents' rights.")). Indeed, a visitation decree can be modified whenever it "would serve the best interests of the child." R.C.W. § 26.10.160(4); *see also* R.C.W. § 26.09.240(10). The Washington Supreme Court's contention that granting limited visitation is "the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the 'best family,' " *id.* at 21a, is plainly erroneous.

Moreover, that a grandparent must prove that the visitation "serve[s] the best interest of the child," R.C.W. § 26.10.160(3), provides adequate protection against the

[7] In this case, the trial court ordered "visitation of one weekend per month, [starting on Saturday at 4:30 p.m. to Sunday at 6:00 p.m.,] one week in the summer, and four hours on the birthday of each of the [girls]." Pet. App. 56a; *see also id.* at 75a.

"arbitrary" application of the statute in any case. To be sure, R.C.W. § 26.10.160(3) does not enumerate a list of factors that the trial court is to consider in determining whether visitation is in the "best interest of the child." Under the since-amended companion statute, R.C.W. § 26.09.240(6), however, the trial court may consider eight factors in determining whether visitation is in the child's "best interest." These include "the strength of the relationship between the child and the petitioner," "[t]he relationship between each of the child's parents or the person with whom the child is residing and the petitioner," "[t]he nature and reason for either parent's objection to granting . . . visitation," "[t]he effect that granting visitation will have on the relationship between the child and the child's parent," "[t]he residential time sharing arrangements between the parents," the petitioner's "good faith" and history of criminality or "physical, emotional, or sexual abuse or neglect," and "[a]ny other factor relevant to the child's best interest." R.C.W. § 26.09.240(6).

While this inquiry is " 'highly fact specific,' " Pet. App. 47a, it gives substantial weight to a parent's legitimate reasons for denying visitation. Surely where a visitation statute provides such guidance to the trial court, the statute bears a "reasonable relation" to the State's interest in reconciling the rights of grandparent, parent and child, and is thus not an "arbitrary" or "irrational" interference with the parental liberty interest in directing the upbringing of children.[8]

[8] The Washington Supreme Court also reasoned that the statute was unconstitutional because it "lack[s] other safeguards to prevent stable families from defending in court against frivolous petitions for visitation." Pet. App. 22a. The court particularly noted that "the statute[] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child." *Id.* Furthermore, the statute does not "require the court to take into consideration such factors as the parents' reasons for restricting visitation

* * * *

Fifty state legislatures have carefully weighed the interests of parent, child, and grandparent and concluded that grandparents should, in some circumstances, be allowed to establish that visitation with their grandchild serves the "best interest of the child." The statutes of all fifty States demonstrate that " 'the traditions and conscience of our people' " do not recognize a fundamental right in a parent to deny a grandparent visitation with a child. *Michael H.*, 491 U.S. at 122 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)). While the Due Process Clause prohibits the arbitrary application of any state statute and requires, under its procedural component, proper notice and hearing procedures, it says nothing about how the balance between the respective persons should be struck. That determination is to be made by the States.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

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with the petitioner or any allegations of past physical or mental abuse by petitioner when making a visitation determination." *Id.*

Whatever the law may have been, it is clear that "R.C.W. § 26.09.240 now requires any nonparent seeking visitation to show that he or she has a significant relationship with the child." Pet. App. 9a. Indeed, the petitioner must make this showing "by clear and convincing evidence." R.C.W. § 26.09.240(3). Moreover, the trial court must also now consider the parent's reasons for denying visitation. *See id.* at (6)(c). It is thus clear that the statute provides sufficient standards to ensure against its arbitrary application in any case and that it bears "a reasonable relation to" the State's substantial interest in reconciling the rights of the grandparent, parent and child. *Meyer*, 262 U.S. at 400.

Respectfully submitted,

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Petitioners,

v.

TOMMIE GRANVILLE,
Respondent.

On Writ of Certiorari To The Supreme Court of Washington

BRIEF *AMICI CURIAE* OF AARP AND GENERATIONS UNITED IN SUPPORT OF PETITIONERS

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No. 99-138

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On Writ of Certiorari to the Supreme Court of Washington

BRIEF *AMICI CURIAE* OF AARP AND GENERATIONS UNITED IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*[1]

AARP is a nonprofit membership organization of more than 33 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Approximately seventy percent of older Americans are grandparents. AARP & The Roper Organization, *Mature America in the 1990s: A Special Report from Modern*

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[1] This brief has been authored in its entirety by undersigned counsel for the amici. No person or entity, other than the named amici and their counsel, made any monetary contribution to the preparation or submission of this brief.

Maturity Magazine and the Roper Organization, MODERN MATURITY, 1995, at 18-19. The AARP Grandparent Information Center, established in 1993, serves as a national resource center for grandparents who are raising their grandchildren. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens.

Generations United (GU) is a nonprofit national membership organization that advocates for the mutual well being of children, youth, and the elderly. GU was founded by the Child Welfare League of America, the Children's Defense Fund, the National Council on the Aging, and AARP to forge a common agenda among advocates for both younger and older constituencies. GU's membership includes over 100 national, state and local organizations that represent more than 70 million Americans. GU's Grandparents and Other Relatives Raising Children Project educates policy makers and the public, trains individuals serving relative-headed families, and distributes educational publications. GU serves as a catalyst for collaboration among organizations representing older and younger Americans, providing a forum to explore areas of common ground while celebrating the richness of each generation.

By written consent of the parties,[2] *amici curiae* submit this brief in support of Petitioners.

SUMMARY OF THE ARGUMENT

The Court's decision in this case will reach far beyond the boundaries of the state of Washington. All fifty states have passed visitation statutes which, like Washington, permit grandparents to petition the courts for an order awarding visitation with their grandchild, when such visitation is in the best interest of the child. Grandparent visitation statutes have been enacted as a national response to increasing rates of

[2] Letters of consent from all parties have been filed separately with the Clerk of the Court.

parental drug use, teen pregnancy, divorce, single-parent households, crime, and child abuse. The legislative history of grandparent visitation statutes around the country is replete with examples of legislators and their constituents testifying about the need for such statutes to promote the well being of children who are facing challenges unprecedented in this nation's history.

Not a single state statute gives grandparents an automatic right to visit with their grandchild. Instead, all grandparent visitation statutes require judges to look carefully at the individual families before them and ascertain whether a particular child would benefit from visitation with the petitioning grandparent. The fifty states were unanimous in selecting the best interest of the child standard as the basis for determining whether to order visitation. *See* attached chart, Comparison of Grandparent Visitation Statutes Nationwide (Appendix A).[3]

The Supreme Court of Washington held that the best interest of the child standard is "insufficient" to, override the parents' right to family privacy under the United States Constitution. *In re Custody of Smith*, 969 P.2d 21, 30-31 (Wash. 1998)(en banc). This ruling misapplies the precedent of this Court. Because an award of visitation does not constitute a substantial infringement of parents' rights, grandparent visitation statutes based on the child's best interest are well within the ambit of constitutional state powers.

ARGUMENT

I. DEMOGRAPHIC CHANGES IN THE UNITED STATES LED TO THE PASSAGE OF GRANDPARENT VISITATION STATUTES IN FIFTY STATES

[3] This chart is based on *amici's* analysis of the statutes listed *infra* in note 20.

A. As Challenges Facing Families Increase, Grandparents are Playing a More Significant Role in the Rearing of Grandchildren.

Approximately 60 million Americans, comprising 31% of the United States population, are grandparents.[5/] Greater longevity has contributed to an increase in the number of grandparents in this country. In 1900, life expectancy in the United States was forty-six years. In 1985, life expectancy was more than seventy-three years for men and eighty years for women.[6/] In this century, the rate of growth of the elderly population greatly exceeded the growth rate of the population of the country as a whole, and people eighty-five years and older are the fastest growing segment of the elderly population.[7/] Contemporary grandparents are "healthier, more educated, and more affluent than any generation before them."[8/]

AARP's 1998 Grandparent Survey found that today's grandparents are very involved in their grandchildren's lives. Eighty-two percent of the grandparents surveyed reported that they had visited with a grandchild in the month preceding the survey. Forty-four percent stated that they usually see a grandchild at least once a week. Eighty-five percent reported that they had spoken with a grandchild on the telephone in the past month.[9/] Similarly, a grandparent survey by the Roper

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[5/] *The Grandparent Niche* (last modified Aug. 4, 1998) <http://www.roper.com/news/content/news52htm>.

[6/] ARTHUR KORNHABER, CONTEMPORARY GRANDPARENTING 10 (1996).

[7/] U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P23-194, *1997 Population Profile of the United States* 50 (Sept. 1998).

[8/] KORNHABER, *supra* note 5, at 11.

[9/] AARP Research Group, The 1998 Grandparenting Survey: The Sharing and Caring Between Mature Grandparents and Their Grandchildren 22-25, July 1999, AARP Washington, DC. These survey

Organization, reported in AARP's *Modern Maturity* magazine, found that in a typical month, a majority of grandparents have grandchildren over for dinner, over forty percent have grandchildren over to spend at least one night, twenty-five percent take a trip to visit their grandchildren, and two-thirds speak with their grandchildren over the telephone.[9/]

Grandparents are also an important provider of child care, especially for young children. In 1993, 17% of the nation's preschoolers, or almost 1.7 million young children, were cared for during the day by grandparents while their mothers worked.[10/]

Research demonstrates that grandparents contribute significantly to the healthy development of their grandchildren.[11/] For instance, children who have close relationships with their grandparents were found to be more emotionally secure than other children.[12/] Grandparents serve an important function as role models; children's relationships with their grandparents affect their relationships with their own grandchildren two generations later.[13/]

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results reflect the responses of 650 grandparents who were not living in the same household as their grandchildren.

[9/] AARP & The Roper Organization, *supra*, at 18-19.

[10/] Lynne M. Casper, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P70-53, *Who's Minding Our Preschoolers?* 1 (Mar. 1996).

[11/] Vincent K. Adkins, *Grandparents as a National Asset: A Brief Note*, 24(1) ACTIVITIES, ADAPTATION & AGING, 13-18 (1999).

[12/] Marie Purnell & Beatrice Bagby, *Grandparents' Rights Implications for Family Specialists*, 42 FAMILY RELATIONS 175 (April 1993), citing ARTHUR KORNHABER and K.L. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION (1981).

[13/] *Id.*, citing H.Q. Kivnick, *Grandparenthood: An overview of meaning and mental health*, 22 GERONTOLOGIST 59-66 (1982).

An increasing number of children, especially children under 6 years of age, are living with their grandparents. Approximately 4 million American children currently live with their grandparents in households where the grandparents own or rent the home. One million four hundred thousand children live in a household where neither parent is present and the grandparent assumes the role of primary caregiver. The number of grandparent caregivers has increased by 75% since 1970 (based on comparative census data from 1970 to 1997).[14]

The United States Department of Commerce, Current Population Reports, notes that the increase in the number of grandparent caregivers "has been attributed to the growth in drug use among parents, teen pregnancy, divorce, the rapid rise of single-parent households, mental and physical illness, AIDS, crime, child abuse and neglect, and incarceration of parents."[15] In 1994, the AARP Grandparent Information Center surveyed 479 grandparents raising grandchildren regarding the reasons for assuming parental responsibility. The reasons reported were substance abuse by parents (44%), child abuse or neglect (28%), teenage pregnancy or parents' failure to handle children (11%), death of a parent (5%), unemployment of a parent (4%), divorce (4%), and other reasons, including HIV/AIDS (4%).[16]

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[14] Terry A. Lugaila, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P20-514, *Marital Status and Living Arrangements: March 1998* (Update), at iii Table A (1998).

[15] Ken Bryson and Lynne M. Casper, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P23-198, *Coresident Grandparents and Grandchildren* 1 (May 1999)(citing Meredith Minkler, *Intergenerational Households Headed by Grandparents: Demographic and Sociological Contexts*, in GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: BACKGROUND PAPERS FROM GENERATIONS UNITED'S EXPERT SYMPOSIUMS (Generations United ed. 1998).

[16] Renee Woodworth, Grandparent-headed Households and their Grandchildren, Sept. 8, 1994, AARP Grandparent Information Center, Washington, DC.

While more children are living with grandparent caregivers, a decreasing number of children are living with two parents, even when stepparents and adoptive parents are included. The proportion of children living with two parents declined from 85% in 1970 to 68% in 1996, and the proportion of children living with one parent grew from 12% to 28%. Of these single parents, in 1996, 39% were divorced, 37% had never been married, 21% were separated from their spouse, and 4% were widowed.[17]

Grandchildren in single-parent families and step-families report being closer and more involved with their grandparents than grandchildren from families with two biological parents present.[18] Indeed, grandparents can be a stabilizing force for children whose parents have divorced or died.[19]

B. The Legislative History of Grandparent Visitation Statutes Nationwide Demonstrates that States Enacted These Statutes to Promote the Welfare of Children.

Prior to 1965, grandparents had no statutory right to visit with their grandchildren. From the mid-1960s through the end of the century, state legislatures have been troubled by the effect on children of the increasing rates of divorce, out-of-wedlock births, teen pregnancy, drugs, AIDS, and child abuse and neglect. In response to these concerns, all fifty state legislatures (but not the District of Columbia) enacted laws

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[17] U.S. DEP'T OF COMMERCE, *supra* note 6, at 27, 48.

[18] G.E. Kennedy & C.E. Kennedy, *Grandparents: A special resource for children in stepfamilies*, JOURNAL OF DIVORCE AND REMARRIAGE, 19, 45-68 (1993).

[19] Purnell & Bagby, *supra* note 12, at 175.

which promote grandparent visitation when found to be in the child's best interest.[20] These laws specify circumstances in

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[20] ALA. CODE §§ 26-10A-30, 30-34.1 (West, WESTLAW through 1999 Reg. Sess.); ALASKA STAT. §§ 25.20.065, 25.24.150 (Deering, LEXIS through 1998 2nd Spec. Sess.); ARIZ. REV. STAT. ANN. §§ 9-13-103, 25-409 (West, WESTLAW through 1999 1st Reg. Sess. and 1st & 2nd Spec. Sess.); ARK. CODE ANN. § 9-13-103 (West, WESTLAW through 1999 Reg. Sess.); CAL. FAM. CODE §§ 3102 to 3104 (West, WESTLAW through 1997-1998 Reg. Sess. and1st Ex. Sess.); COLO. REV. STAT. §§ 19-1-117, 19-1-117.5 (West, WESTLAW through 1999 1st Reg. Sess.); CONN. GEN. STAT. § 46b-59 (West, WESTLAW through Gen. St., Rev, to 1-1-99); DEL. CODE ANN. tit. 10 § 1031 (West, WESTLAW through 1998 Reg. Sess.); FLA. STAT. ANN. §§ 752.01, 752.07 (West, WESTLAW through 1998 2nd Reg. Sess.); GA. CODE ANN. § 19-7-3 (West, WESTLAW through 1999 General Assembly); HAW. REV. STAT. §§ 571-46, 571-46.3 (West, WESTLAW through 1999 Act 201); IDAHO CODE § 32-719 (Deering, LEXIS through 1999 Reg. Sess.); ILL. COMP. STAT. §§ 5/607, 5/11-7.1 (West, WESTLAW through 1999 Act 5); IND. CODE §§ 31-17-5-1, 31-17-5-2, 31-17-5-9 (West, WESTLAW through 1999 1st Reg. Sess.); IOWA CODE § 598.35 (West, WESTLAW 8/18/1999 amendments received); KAN. STAT. ANN. § 38-120 (West, WESTLAW through 1998 Reg. Sess.); KY. REV. STAT. ANN. § 405.021 (West, WESTLAW through 1998 Reg. Sess.); LA.. REV. STAT. ANN. §§ 9:344, Ch. C. Art. 1264 (West, WESTLAW through 1998 1st Ex. Sess. and Reg. Sess. Acts); ME. REV. STAT. ANN. tit. 19-A, §§ 1801-1804 (West, WESTLAW through 1997 2nd Spec. Sess); MD. CODE ANN., FAM. LAW § 9-102 (West, WESTLAW through 1998 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 119 § 39D (West, WESTLAW through 1999 1st Annual Sess.); MICH. COMP. LAWS ANN. § 722.27b (West, WESTLAW through 1999 Regular Sess.); MINN. STAT. ANN. § 257.022 (West, WESTLAW through 1998 1st Spec. Sess.); MISS. CODE ANN. §§ 93-16-1, 93-16-3, 93-16-5, 93-16-7 (West, WESTLAW through 1999 Reg. Sess.); MO. ANN. STAT. § 452.402 (West, WESTLAW through 1998 2nd Reg. Sess.); MONT. CODE ANN. §§ 40-9-101, 40-9-102 (West, WESTLAW through 1997 Reg. Sess.) ; NEB. REV. STAT. §§ 43-1801 to 43-1803 (West, WESTLAW through 1998 1st Spec. Sess.); NEV. REV. STAT. ANN. § 125A.330 (West, WESTLAW through 1997 Reg. Sess.); N.H. REV. STAT. ANN. § 458:17-d (West, WESTLAW through 1998 Reg. Sess.); N.J. STAT. ANN. § 9:2-7.1 (West, WESTLAW through L. 1999, c.61); N.M. STAT. ANN. §§ 40-9-1.1, 40-9-2 to 40-9-4 (West,

which grandparents have standing to petition a court for a judicial decree ordering visitation.[21]

The legislative history of the grandparent visitation statutes demonstrates that the laws were enacted to promote the welfare of children. Legislatures around the country conducted extensive hearings on the need for grandparent visitation

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WESTLAW through 1999 1st Reg. Sess.); N.Y. DOM. REL. LAW § 72 (West, WESTLAW through L. 1999); N.C. GEN. STAT. §§ 50-13.2, 50-13.2A, 50-13.5 (West, WESTLAW through 1998 Cumulative Supplement); N.D. CENT. CODE § 14-09-05.1 (West, WESTLAW through 1999 Reg. Sess.); OHIO REV. CODE ANN. §§ 3109.051, 3109.11, 3109.12 (West, WESTLAW through 1999 portion of 123rd G.A.); OKLA. STAT. ANN. tit. 10, §§ 5, 7505-6.5 (West, WESTLAW through 1998 1st Ex. Sess.); OR. REV. STAT. §§ 109.121, 109., 123, 109.332 (West, WESTLAW through 1997 Reg. Sess. and 1998 Cumulative Supp.); 23 PA. CONS. STAT. ANN. §§ 5311-5314 (West, WESTLAW through 1998 Reg. Sess.); R.I. GEN. LAWS § 15-5-24.3 (West, WESTLAW through 1998 Reg. Sess.); S.C. CODE ANN. § 20-7-420(33) (West, WESTLAW through 1998 Reg. Sess.); S.D. CODIFIED LAWS §§ 25-4-52, 25-4-54 (West, WESTLAW through 1999 Reg. Sess.); TENN. CODE ANN. §§ 36-6-305 to 36-6-307 (West, WESTLAW through 1998 Reg. Sess.); TEX. FAM. CODE ANN. §§ 153.433, 153.434 (West, WESTLAW through 1997 Reg. Sess.); UTAH CODE ANN. § 30-5-2 (West, WESTLAW through 1999 General Session); VT. STAT. ANN. tit. 15, §§ 1013-1016 (West, WESTLAW through 1997 Adj. Sess.); VA. CODE ANN. §§ 20-107.2, 20-124.2 to 20-124.4 (West, WESTLAW through 1999 Reg. Sess.); WASH. REV. CODE §§ 26.10.160, 26.09.240 (West, WESTLAW through 1998 Reg. Sess.); W. VA. CODE §§ 48-2B-1 to 48-2B-9 (West, WESTLAW through 1999 2nd Ex. Sess.); WIS. STAT. §§ 767.245, 880.155 (West, WESTLAW through 1999 Act 3); WYO. STAT. ANN. § 20-7-101 (West, WESTLAW through 1999 Reg. Sess.).

[21] Many states, *e.g.* Alabama, Mississippi, New York and Wyoming, confer visitation rights on grandparents alone. Other states, *e.g.* Arizona and Idaho, permit great-grandparents to petition for visitation rights as well. Some states, *e.g.* New Jersey and Rhode Island, permit both grandparents and siblings to petition for visitation. A few states, *e.g.* Connecticut and Washington, permit any person to petition for visitation rights.

legislation in which their state citizens, doctors, psychiatrists, judges, and state agencies testified. Below are some examples of the legislative histories of these statutes, including the legislative history of the grandparent visitation statute at issue in this case from the state of Washington.

The Washington Code has two visitation statutes which permit grandparents to petition for visitation rights, section 26.09.240, concerning divorce and legal separation, and section 26.10.160, concerning nonparental actions for child custody. Prior to 1996, both sections permitted any person to petition for visitation rights at any time and directed the courts to utilize the best interest of the child standard to determine whether to award visitation. *See* 1977 Wash. Laws Ch. 272 § 1; 1987 Wash. Laws Ch. 460 § 18; 1989 Wash. Laws Ch. 375 § 13. As the Supreme Court of Washington explained, *In re Custody of Smith*, 969 P.2d 21, 26 (Wash. 1998)(en banc), the legislature amended section 26.09.240 in 1996. 1996 Wash. Laws Ch. 177, § 1. Section 26.09.240 was changed to permit persons other than parents to petition for visitation only if the parents have filed for divorce or legal separation (though section 26.10.160 continues to permit a petition to be filed at any time). Also, the revised section 26.09.240 specifies numerous factors to be considered when determining the best interest of the child, including the relationship between the child and the grandparent, the relationship between the parents and the grandparent, the nature and reasons for the parents' objection to the grandparent's visitation, the effect of granting visitation on the relationship between the child and the child's parents, and any criminal history or history of physical, emotional, or sexual abuse or neglect by the grandparent. The revised statute contains the presumption that grandparent visitation is in the best interest of the child but requires consideration of evidence on this issue. The legislative history of the 1996 bill includes the following summary of the testimony in support of passage:

> Many grandparents have essentially raised their grandchildren because the parents are too young, are drug addicted, or otherwise incapable of raising their children. When those parents get divorced, the grandparents may be completely cut off from the grandchildren because of hostilities of one or both of the parents towards the grandparents. This bill will make it a little easier for grandparents to obtain court approval to continue to have contact or visitation with their grandchildren. The bill will not create an automatic right of grandparents to continue to have contact with their grandchildren.

Hearing on ESHB 1556 Before the House Comm. on Law & Justice, 1996 Reg. Sess. 2 (Wash. 1996)(Appendix B).

New York pioneered grandparent visitation legislation in 1966, passing a statute targeted to children whose parent or parents are deceased. A state Assemblyman explained the purpose of the bill:

> Since the grandparents are often the nearest responsible relatives other than the child's parents and frequently offer an additional stability in situations involving broken homes, especially where, as proposed herein one or more parents have died, the interests of justice may make their visitation desirable and even crucial. This bill retains discretion in the courts to grant or deny such visitation, and presents a worthwhile purpose.

N.Y.S. LEGISLATIVE ANNUAL 14 (1966)(memorandum of Assemblyman Noah Goldstein)(Appendix C). In 1975, the statute was broadened to apply to all situations in which "equity" warranted such visitation. A state senator explained that the change in the law was prompted by concern for the "welfare of children" in cases of child abuse and neglect and other situations where grandparent visitation "could be of invaluable consequence to the children and ultimately the society." N.Y.S. LEGISLATIVE ANNUAL 51 (1975) (memorandum of Senator Leon E. Giuffreda)(Appendix C).

In Connecticut, in 1978, the grandparent visitation statute was broadened to apply not only to divorce but also to cases in which the parents separate but file no legal action or the parents were never married. In the debate on the bill, a state Senator testified:

> I have seen so many situations where the child's rights are really so disregarded by the parents who are feuding that the only people that care about the child are the grandparents. This bill does not grant custodial rights, it merely grants visitation rights and I have seen cases where the parents are so embittered with each other that they deprive the grandparents of the rights to visit with the grandchildren. . . . I think [the bill] is a step in the right direction to make certain that the child's interests are the ones that are really protected the most.

21 S. PROC., Pt. 2, 1978 Sess. 33-34 (Conn. 1978)(statement of Senator Ballen)(Appendix D).

Michigan expanded its grandparent visitation statute in 1982 to apply not only when a parent is deceased but also when there is a custody dispute involving the grandchild. The legislative history includes the following arguments in favor of the bill:

> Many grandparents report that they have been cruelly prevented from maintaining contact with their grandchildren by the animosity of former children-in-law and their new spouses. In some cases such obstructive behavior is associated with the abuse of the children in question. A great deal of evidence exists that a healthy relationship with a grandparent is of great emotional importance to a child and that it is in the interests of all concerned to preserve such a relationship when it exists. It is nevertheless true that parents have a right and a duty to supervise the upbringing of their children and

> that not all grandparents constitute a healthy influence on their grandchildren. The mediation of a court, ensuring the protection of the best interests of the child, should provide a way of establishing the proper balance of interests.

H. LEGISLATIVE ANALYSIS SECTION FOR S. 439 & 440 (Mich. 1982)(Appendix E).

Prior to 1984, a petition for grandparent visitation could be filed in Kansas only in cases involving either a divorce or deceased parent. In 1984, Kansas broadened its grandparent visitation statute to apply to intact families, in which both parents are alive and married to each other. The House Judiciary Committee received written testimony from numerous psychiatrists supporting the change in the law. One psychiatrist wrote:

> In summary, child-grandparent relationships have important psychological and social contributions to make toward the healthy development of children. Unfortunately, parents sometimes do not recognize this truth, and in pursuit of their private wars, sacrifice the children's best interest for their own goals. One of the newly emerging situations in our current social complexity is the gulf between grown children or semi-grown children (teenagers) and their parents precipitated by their participation in the drug scene. This clash of values and life styles frequently includes depriving grandparents of contacts with the grandchildren.

Hearing on S. 615 Before the House Comm. on Judiciary, 1984 Sess. (Kan. 1984)(letter from Herbert C. Modlin, M.D.)(Appendix F).

Prior to 1993, grandparents in California could only obtain visitation rights with grandchildren in the context of a legal proceeding for divorce or legal separation of the parents.

California revised its code in 1993 to permit grandparents to file an independent action for visitation in any proceeding pertaining to the custody of the child, including actions for paternity, actions under the state's Domestic Violence Prevention Act, guardianship actions, and juvenile dependency actions. The California Senate Committee Report states:

> In California, nearly 500,000 [children] live with grandparents. Supporters of grandparents visitation warn that with a drug epidemic, poverty and rising single parenthood, these numbers will double in the next 10 years. Most of these grandparents are raising their grandchildren without benefit of custody or legal guardianship meaning the children can be and often are taken from them without notice and without recourse to visitation or contact. The grandchildren may be totally cut off from the grandparents whom they have learned to love and to trust for support and guidance.
>
> The grandparents are denied visitation with their grandchildren usually because of very petty and often trivial disputes between the grandparents and the parents.

Comm. Rep. on S. 306, 1993-94 Reg. Sess. (Cal. 1993), available in WESTLAW, CCA-Old (Appendix G).

The Nevada State Legislature revised its grandparent visitation legislation in 1999 to apply not only to children whose parents are divorced or deceased but also to children born out of wedlock. The 1999 revisions specified additional factors to be considered by the courts when reviewing a petition for grandparent visitation, including whether the grandparent can serve as a role model for the child. The Nevada Senate Committee on Judiciary heard testimony in support of the proposed legislation from a family court district judge.

> [Judge Steel] recalled instances of children who may have lived with "grandmother" for 7 or 8

> years, and the grandmother was the day-care provider. When the custodial parent decided to move on with his or her life, he or she just walked away and did not give visitation rights. Judge Steel asserted the person who is hurt as much as the grandparent is the grandchild. She said there is a fine line the judge often cannot cross over if it will cause a conflict between the parent and grandparent. Additionally, Judge Steel stated the judges must decide what constitutes a "meaningful relationship" in each and every case. She mentioned in this day and age, children are having children, and they are often angry with their parents and taking their children away from their grandparents. Judge Steel referred to the provision in the bill regarding the grandparent being a good role model. She favors that provision and noted it would help judges in placing children, when they know two immature people are raising them, to know they could perhaps get a status check once a month from the grandparents to ensure the child is still thriving in their care and custody.

Hearing on Assembly Bill 436 Before the Senate Comm. on Judiciary, 70th Legis. Sess. 4 (Nev. 1999)(minutes of statement of Judge Cynthia Steel)(Appendix H).

Similarly, in Montana, the legislature was concerned about out-of-wedlock births and the continuation of grandparent/grandchild relationships after the child lived with the grandparent for a period of time. In 1983, Montana expanded its grandparent visitation statute, removing the limitation that the statute applied only when a parent was deceased. The bill's sponsor noted:

> Previously we as a society have just looked at what the parents want and have not considered the child's needs and views. . . . The unwed mother might raise her child in the grandparents

> home. A grandparent-grandchild relationship has then been established. If the unwed mother decides to leave the home and take the child, the grandparent should be able to petition the court for visitation rights.

Hearing on H. 376 Before the House Comm. on Judiciary, 48th Legis. Sess. 3 (Mont. 1983)(minutes of statement of Representative Kathleen McBride)(Appendix I).

In 1986, Nebraska was the last of the 50 states to adopt a grandparent visitation statute (though many states revised their statutes after that date). The Nebraska Senate engaged in extensive debate on the bill, spanning from March 1985 to March 1986. The bill's author explained the need for the legislation when it was first introduced:

> The rapid social changes affecting our families over several decades threaten the generation bond as most of us have known it. Today's increased mobility and high divorce rates, separations and family abuse problems have tended to separate millions of children from relatives of an older generation who have traditionally served as the emotional buffers between generations as well as custodians of family history and culture. . . .
>
> [I]t is not the grandparent's proprietary interest in grandchildren that justifies an award of custody or visitation. It is the need of the grandchildren to know and associate with concerned grandparents. The pleasure which grandparents may derive from such association is merely a bonus, although a very precious one. Recognizing [sic] that only the child's welfare, including the right to maintain that meaningful association, should be the controlling criteria.

Hearing on LB 105 Before the Senate, Eighty-Ninth Legis., 1st Sess. 87-90 (Neb. 1985)(statement of Senator Lowell Johnson)(Appendix J).

II. AFFIRMANCE OF THE DECISION BELOW WOULD INVALIDATE VIRTUALLY ALL GRANDPARENT VISITATION STATUTES NATIONWIDE

A. While State Visitation Statutes Differ, They All Utilize the Best Interest of the Child Standard.

No two state laws regarding grandparent visitation are exactly the same. The legislatures of each of the fifty states crafted their own individual responses to the social concerns facing their constituents. Many legislatures considered the issue of grandparent legislation numerous times, as statutes were expanded or narrowed. A comparison of the current grandparent visitation laws reveals many similarities and differences in these statutes. *See* attached chart, Comparison of Grandparent Visitation Statutes Nationwide (Appendix A).[22]

Twenty states do not permit grandparents to petition for visitation with grandchildren when the children's parents are married and both parents oppose such visitation. These states specify limited circumstances in which a grandparent may file a petition for visitation, such as a divorce or custody proceeding, the death of a parent, or a child born out-of-wedlock.[23] The other thirty states, including Washington, permit grandparents to petition for visitation regardless of the parent's marital status, even when the parents oppose

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[22] This chart is based on *amici's* analysis of the statutes listed *supra* in note 20.

[23] These states are Arizona, Arkansas, California, Colorado, Delaware, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, South Carolina, Tennessee, Vermont, and Virginia.

grandparent visitation.[24] Of these states, four permit the grandparents to petition for visitation when the parents are married only if the child previously resided with the grandparents for a minimum period of three to twelve months.[25] Another eight of these states permit a petition when the parents are married only if the grandparents have been denied visitation with the grandchild.[26]

Twenty-seven states require courts to take into consideration whether the grandparent has already established a substantial relationship with the grandchild in determining whether to award visitation in an individual case.[27] Eighteen states require the courts to consider the effect of court-ordered grandparent visitation on the child's relationship with the

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[24] These states are Alabama, Alaska, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Many of these states have additional provisions which expressly allow grandparents to petition for visitation when parents are deceased, divorced, separated, or unmarried.

[25] These states are Minnesota, New Mexico, Pennsylvania, and Texas.

[26] These states are Alabama, Florida, Iowa, Mississippi, Missouri, Oregon, Rhode Island, and Utah.

[27] These states are Alaska, Arizona, California, Florida, Indiana, Iowa, Kansas, Maine, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin.

parent.[28] Thirty-one states explicitly permit grandparents to petition for visitation following adoption by a step-parent.[29]

Despite these differences, all the statutes share one important characteristics: the requirement that the trial court determines whether grandparent visitation is in the individual child's best interest. While states differ in their definitions of factors to be considered in determining the best interest of the child, they all concur that the standard of the child's best interest is the appropriate basis for deciding visitation.

B. Only One State Statute Now Requires a Finding of Harm as a Prerequisite to Grandparent Visitation.

The Supreme Court of Washington held that, in order to comply with the United States Constitution's guarantee of privacy, a grandparent visitation statute must require the grandparent to prove that the absence of visitation will harm the child. *In re Custody of Smith*, 969 P.2d at 30. Following this decision, the Washington Senate and House each passed bills to modify the Washington visitation statutes to comply with the decision. However, the two houses could not agree on the

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[28] These states are Alabama, California, Florida, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. The wording of these provisions varies. For example, Oklahoma requires the court to consider the willingness of the grandparent to encourage a close relationship between the child and the parents, while South Carolina requires the court to find that grandparent visitation would not interfere with the relationship between the child and the parents.

[29] These states are Alabama, Alaska, Arizona, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, West Virginia, and Wyoming.

language of the revisions, and therefore, no bill was passed.[30] Currently, the statutes remain as written in 1996, relying upon the best interest of the child standard and not requiring a finding of harm.

In addition to Washington, forty-eight other state grandparent visitation statutes rely solely on the best interest of the child standard and do not require any showing that visitation will prevent imminent harm.[31] Therefore, the Court's decision in this case will have an impact on grandparents' right to seek court ordered visitation not only in Washington but also nationwide.

The Georgia visitation statute is the only state statute requiring a court to find, as a prerequisite to an order of grandparent visitation, that the child will suffer harm from the absence of visitation. The statute requires the court to find both that the visitation is in the best interest of the child and that the "health or welfare of the child would be harmed unless such visitation is granted." GA. CODE ANN. § 19-7-3 (c) (West, WESTLAW through 1999 General Assembly). The provision requiring a showing of harm was added to the statute after the Supreme Court of Georgia held that the Georgia grandparent visitation statute violated the United States Constitution. *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga.), *cert. denied*, 516 U.S. 942 (1995). The Supreme Court of Georgia is the only state supreme court other than the Supreme Court of Washington to reach the conclusion that a grandparent visitation statute violates the United States Constitution.

The Supreme Court of Virginia has interpreted its state statute to require a finding that the denial of grandparent visitation would be detrimental to the child's welfare, when this

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[30] *See* Washington State Legislature, History of HB 1173 (last modified April 26, 1999) <http://www.leg.wa.gov/pub/billinfo/1999-00/house/1750-1774/1773_history.txt>.

[31] *See* statutes cited *supra* note 20, and *amici's* chart analyzing the statutes, Appendix A.

statute was applied to the married parents of the children. As a result, the court concluded that the statute did not violate the United States Constitution. *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998). Subsequently, the Court of Appeals of Virginia, held that the requirement of a showing of harm does not apply when the parents are divorced, only one parent objects to the grandparent's visitation, and the non-custodial parent requests the grandparent's visitation. *Dotson v. Hylton*, 513 S.E.2d 901 (Va. Ct. App.1999). Thus, Virginia does not require proof of harm, except when the statute is applied to married parents.[32]

Two states have held that grandparent visitation statutes violate their state constitutions. The Supreme Court of Tennessee held that the application of the grandparent visitation statute to a married couple violated the Tennessee constitution. *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). The Tennessee legislature subsequently changed the statute to apply only in instances of parental death or divorce. The new statute utilizes a best interest of the child standard and does not require a showing of harm. TENN. CODE ANN. §§ 36-6-305 to 36-6-307 (West, WESTLAW through 1998 Reg. Sess.). The Supreme Court of Florida held that an order of grandparent visitation violates the Florida constitution, both in the case of married parents and when one of the parents is deceased, unless there is a finding that the child will suffer harm. *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998); *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996). The Florida legislature has not revised its statute which was found to violate the Florida constitution.

Numerous state courts have upheld the constitutionality of grandparent visitation statutes that utilize a best interest of

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[32] The Supreme Court of Connecticut expressed concerned about whether its grandparent visitation statute comported with the United States Constitution. The Connecticut court construed the Connecticut visitation statute as applicable to married parents only if the "child's family life had been disrupted," including if there was an allegation of abuse or neglect or the child had lived with the grandparents. *Castagno v. Wholean*, 684 A.2d 1181 (Conn. 1996).

the child standard and do not require a showing that the child will suffer harm. *Cockrell v. Sittason*, 500 So. 2d 1119 (Ala. Civ. App. 1986); *Graville v. Dodge*, 985 P.2d 604 (Ariz. App.), *review denied* (1999); *West v. West*, 689 N.E.2d 1215 (Ill. App. Ct.. 1998); *Sightes v. Barker*, 684 N.E.2d 224 (Ind. Ct. App. 1997); *Spradling v. Harris*, 778 P.2d 365 (Kan. Ct. App. 1989); *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941 (1992); *Martin v. Coop.*, 693 So.2d 912 (Miss. 1997); *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993)(enbanc); *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985); *R.T. v. J.E.*, 650 A.2d 13 (N.J. Super. Ct. Ch. Div. 1994); *Ridenour v. Ridenour*, 901 P.2d 770 (N. Mex. Ct. App. 1995); *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981); *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250 (Ohio Ct. App. 1986); *Deweese v. Crawford*, 520 S.W. 2d 522 (Tex. Civ. App. 1975); *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995); *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995). These cases conclude that while parents have a right to privacy, the state's role as parens patriae enables the state to order grandparent visitation where such visitation would be in the child's best interest. For instance, the Supreme Court of Kentucky stated:

> [T]he General Assembly determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents. Thus, we find that [the Kentucky grandparent visitation statute] is constitutional.

> Central to our finding is the protection afforded the child, the parents and the grandparents. If the statute gave the grandparents the unrestricted right of visitation, there would be much less reluctance to declare it unconstitutional. But visitation cannot be granted until an action is filed in Circuit Court, a hearing conducted before a judge or commissioner, and findings of fact and conclusions of law entered finding that the best interests of the child will be served by granting or denying visitation. Fortunately, it is not a common occurrence for this statute to be called into play, but when it is, the parties are afforded ample protection to preclude either injustice or an unwarranted intrusion into the fundamental liberty of the parents and child.

King v. King, 828 S.W.2d at 632.

While it is certainly in the best interest of children not to suffer harm, the best interest standard is much broader than a focus on harm. For instance, Alaska requires a trial court reviewing a petition for grandparent visitation to "consider whether there is a history of child abuse or domestic violence" by the parent. ALASKA STAT. § 25.20.065 (Deering, LEXIS through 1998 2nd Spec. Sess.). This is a very different inquiry than looking for current bruises and proof that occasional grandparent visitation will prevent the bruises. The best interest standard provides a basis for grandparents to maintain contact with children who have previously been abused by their parents and are currently living with their parents. As demonstrated by the legislative history of the grandparent visitation statutes, the states determined that the best interest standard was the appropriate means of protecting children.

Moreover, the best interest standard permits courts to consider the importance of a substantial prior relationship between grandparents and grandchildren, for instance when the child resided with the grandparents for a minimum of twelve months. *See* MINN. STAT. ANN. § 257.022 (West, WESTLAW

through 1998 1st Spec. Sess.); 23 PA. CONS. STAT. ANN. §§ 5313 (West, WESTLAW through 1998 Reg. Sess.). While it may be very difficult to prove that a child will suffer psychological devastation from the destruction of the grandparent/grandchild relationship in such circumstances, it is more readily ascertainable that the best interest of the child will be served by the continuation of the grandparent/grandchild relationship. The states have determined that a best interest standard serves society's interest in children's well being.

There are forty-nine state statutes permitting courts to order grandparent visitation that is in the best interest of the child without requiring courts to find that the individual child will suffer harm from the absence of the petitioning grandparent. If this Court affirms the holding of the Supreme Court of Washington that the United States Constitution requires a finding of harm as a prerequisite to an order of grandparent visitation, then not only the Washington statute but also forty-eight other grandparent visitation statutes will be rendered invalid. In contrast, a reversal of the decision of the Supreme Court of Washington would permit all the states (including Georgia) to grant grandparents the right to visit with their grandchild when such visitation is in the best interest of the child, even if the grandparents cannot prove that the child is in imminent danger.

III. GRANDPARENT VISITATION LEGISLATION TO PROMOTE THE CHILD'S BEST INTEREST IS WELL WITHIN THE AMBIT OF THE STATES' POWERS UNDER THE UNITED STATES CONSTITUTION

All fifty states have determined that it is in the public interest to permit trial courts to consider whether grandparents should have visitation rights in individual cases.

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress . . . or the States legislating concerning local affairs.

Berman v. Parker, 348 U.S. 26, 32 (1954). In determining whether grandparent visitation statutes offend the Constitution, the Court should be cognizant that all fifty states have passed grandparent visitation legislation which relies upon the best interest of the child standard.

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Schall v. Martin, 467 U.S. 253, 268 (1984)(quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) and *Leland v. Oregon*, 343 U.S. 790, 798 (1952)).

The legislative history of the grandparent visitation statutes demonstrates that the states were balancing the liberty interests of parents against the needs of children. Indeed, eighteen states included an explicit provision in their statutes requiring courts to consider the effect of court-ordered grandparent visitation on the child's relationship with the parent.[33] Our Constitution empowers the legislatures, as much as the courts, to protect the liberties of citizens.

> Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare

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[33] *See supra* note 28.

> of the people in quite as great a degree as the courts.

Missouri, K. & T.R. Co. v. May, 194 U.S. 267, 270 (1904).

The Supreme Court of Washington held that the state's interest in the best interest of children is not sufficiently "compelling" to overrule parents' fundamental constitutional right to raise their children. *In re Custody of Smith*, 969 P.2d at 29-31. However, the Washington court failed to recognize that the state's power to protect the public welfare is quite broad and easily includes the protection of the best interests of children. "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. at 33.

This Court has recognized the extensive power of states to enact statutes which are designed to promote the welfare of children. In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 167-68 (1944), the Court stated:

> [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.

Grandparent visitation statutes seek to promote the growth of young people into healthy citizens in a time of changing family structures, including the decrease in two parent households and the increase in grandparents caring for their grandchildren with no parent in the home. These statutes are designed to provide stable, loving psychological relationships for children whose parent or parents are absent, abusive and/or addicted to drugs.

The Constitution does not prohibit trial courts from awarding grandparent visitation when such visitation is in the child's best interest. As the dissenting judges in the Supreme Court of Washington argued, an award of visitation is a minor infringement on parental rights, far less intrusive than a change in custody, an out of home residential placement of a child or termination of parental rights. *In re Custody of Smith*, 969 P.2d at 35-36 (Talmadge, J., dissenting). The privacy cases relied upon by the Supreme Court of Washington are not controlling, because they involve substantial infringements of parents' rights. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972)(grave endangerment of destruction of free exercise of parents' religious beliefs); *Stanley v. Illinois*, 405 U.S. 645 (1982)(termination of parental rights based on insufficient evidentiary standard); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)(unreasonable interference with liberty of parents to direct the upbringing and education of their children where parents wanted to send their children to established religious or military schools). An order for grandparent visitation, when it is in the best interest of the children (as found by the trial court below[34]), is a minor infringement of parents' autonomy which is permissible under the states' parens patriae power and does not violate the United States Constitution.

Indeed, in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977), this Court held that the constitutional protection of the "sanctity of the family" extends to the relationship between a grandmother and her two grandsons. The Court rejected the argument that the "protection of family rights" is limited to the "boundary of the nuclear family."

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents

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[34] *See* Findings of Fact and Conclusions of Law Dated and Filed January 3, 1996, Superior Court of Washington for Skagit County, Appendix C to the Petition for a Writ of Certiorari, pages 72a-75a.

> sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

Id. at 504.

The Supreme Court of Washington took issue with the best interest standard as the means for determining whether grandparent visitation is "justified." *In re Custody of Smith*, 969 P.2d at 30-31. The court stated that the legislation should "require the petitioner to establish that he or she has a substantial relationship with the child." *Id.*

However, it is up to the legislature, not the courts, to select the means by which the state will attain the goal of promoting the public welfare. *Berman v. Parker*, 348 U.S. at 33. "Legislative bodies have broad scope to experiment," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1953), especially when confronting difficult societal problems, such as child abuse and parental drug addiction.

> State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the State free to experiment with various remedies has produced novel approaches and promising progress.

Santosky v. Kramer, 455 U.S. 745, 771 (1982)(Rehnquist, J., dissenting). All fifty states have determined that grandparent visitation is a valuable remedy to address the problem of child abuse and neglect. No longer experimental, grandparent visitation statutes based on the best interest of the child standard have promoted the welfare of children in all fifty states for more than a decade.

Moreover, since the protection of the welfare of children through grandparent visitation statutes is a rational

means of addressing societal problems such as child abuse, single parent households, teenage parents, and drug addiction, it is irrelevant whether each state legislature explicitly targeted each of these problems. It is sufficient that a valid purpose for these statutes has been identified. This Court has held that, in confronting a constitutional challenge to a statute, courts may "never require a legislature to articulate its reasons for enacting a statute," and therefore "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [statute] actually motivated the legislature." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

CONCLUSION

For the reasons stated, *amici* urge the Court to reverse the decision below and to hold that the Washington grandparent visitation statutes which utilize the best interest of the child standard do not violate the United States Constitution.

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Dated: November 12, 1999

MOTION FILED
NOV 16 1999

No. 99-0138

IN THE

SUPREME COURT OF THE UNITED STATES

TROXEL, JENNIFER, et al.
Petitioner,
v.
GRANVILLE, TOMMIE
Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT

MOTION FOR AND AFFIDAVIT OF JASON R. SMITH IN SUPPORT OF LEAVE TO FILE AMICUS CURIAE BRIEF OF GRANDPARENTS' UNITED FOR CHILDREN'S RIGHTS, INC.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF GRANDPARENTS' UNITED FOR CHILDREN'S RIGHTS, INC.

MOTION

Pursuant to Sup. Ct. R. 37.3, Grandparents' United for Children's Rights, Inc. moves this Honorable Court for leave to file its *amicus curiae* brief in the above-captioned matter. The grounds for this motion are that movant was not provided with notice of the Order requiring briefs to be filed no later than 3:00 p.m. on November 12, 1999, and that the parties have provided written consent for the filing

of Grandparents' United for Children's Rights, Inc.'s *amicus curiae* brief. This motion is based on the accompanying Affidavit of Jason R. Smith and all matters of record.

Respectfully Submitted,

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ON WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT

AFFIDAVIT OF JASON R. SMITH

STATE OF WISCONSIN

COUNTY OF DANE

Jason R. Smith states as follows:

1. I am one of the attorneys for Grandparents' United for Children's Rights, Inc.

2. I received written consent of the parties to file an *amicus curiae* brief on behalf of Grandparents' United for Children's Rights, Inc.

3. Attorneys Mark D. Olson and Catherine Wright Smith did not inform me of the existence of the Order requiring briefs to be submitted on November 12, 1999. The original written consent of Attorneys Olson and Wright Smith were filed with the Court on November 15, 1999.

4. At no time prior to November 15, 1999 did I receive a copy of or notice of the Court's Order requiring the parties to submit briefs no later than 3:00 p.m. on November 12, 1999. I was first informed of this Order as a result of a telephone call from the Clerk of the Supreme Court to my colleague, Carol Gapen. Subsequently, Ms. Gapen informed me of this telephone call.

5. Proceeding without knowledge of the Court's Order, I calculated the time for filing of the *amicus curiae* brief pursuant to Sup. Ct. R. 25.1 and 37.3(a). I calculated the 45th day from the date of Court's Writ of Certiorari to be November 13, 1999. Because November 13, 1999 was a Saturday, I calculated the deadline for filing of the *amicus curiae* brief to be Monday, November 15, 1999, pursuant to Sup. Ct. R. 30.1.

6. I am informed and believe that the *amicus curiae* brief of Grandparents' United for Children's Rights, Inc. complies with the applicable Supreme Court Rules.

7. I make this affidavit on personal knowledge.

Jason R. Smith

Subscribed and sworn to before me
this 16th day of November, 1999.

Vicki L. Eggers
Notary Public, State of Wisconsin
My commission expires: 3/25/01.

(23)

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BRIEF OF AMICUS CURIAE OF GRANDPARENTS UNITED FOR CHILDREN'S RIGHTS, INC.

STATEMENT OF THE CASE

Grandparents United for Children's Rights, Inc. ("Grandparents United"),[1] having obtained consent as

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[1] This *amicus curiae* brief was authored in part by the attorneys named on the cover page on behalf of Grandparents United. Attorney Jason R. Smith assisted in the preparation of this brief. No monetary contributions were provided in exchange for the preparation of this brief.

required by Supreme Court Rule 37, files this *amicus curiae* brief in support of the appellant. Grandparents United urges this Court to recognize the importance of grandparents in the lives of children and the constitutional rights of children to maintain their relationships with important people in their lives. Furthermore, Grandparents United provides information regarding the public policy associated with finding the Washington visitation statute constitutional and allowing visitation when it is found to be in the best interest of the child.

QUESTION PRESENTED

WHETHER THE WASHINGTON SUPREME COURT ERRED IN ITS CONCLUSION THAT STATUTES GRANTING THIRD PARTIES, INCLUDING GRANDPARENTS, A RIGHT TO PETITION FOR VISITATION RIGHTS WITH A MINOR CHILD IF VISITATION IS "IN THE BEST INTEREST OF THE CHILD," IMPERMISSIBLY INTERFERE WITH A PARENT'S FUNDAMENTAL INTEREST IN "CARE, CUSTODY AND COMPANIONSHIP OF A CHILD" WITHOUT CONSIDERATION OF THE CONSTITUTIONAL RIGHTS OF THE CHILD.

SUMMARY OF ARGUMENT

Determination of the constitutionality of visitation statutes must include consideration of the constitutional rights of children. The Washington Supreme Court erred in conducting its constitutional analysis absent recognition of the children's rights to liberty and equal protection in maintaining relationships with their grandparents.

A child's constitutional rights should be examined in light of what is in the child's "best interest." This standard is ascertainable by applying the ABA's recommended factors to best interest hearings involving visitation. The recognition and application of these factors will alleviate the current inconsistency among the States.

Visitation statutes do not impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of a child because the nature of visitation is temporary and subject to future change. In fact, visitation statutes provide a necessary vehicle for representing the rights of children.

Public policy considerations require that "best interest" visitation statutes be upheld as constitutional. The form of the American unitary family has changed. More persons, including grandparents, are involved in raising children today than ever before. Children are developing nurturing relationships with persons other than their biological parents. These children have a constitutional right to due process in maintaining such

relationships when those relationships are in the child's best interest.

ARGUMENT

I. CHILDREN'S CONSTITUTIONAL RIGHTS TO LIBERTY AND EQUAL PROTECTION REQUIRE THAT THEY CONTINUE RELATIONSHIPS WITH THEIR GRANDPARENTS WHEN IT IS IN THE CHILD'S "BEST INTEREST."

The Washington Supreme Court improperly analyzed the constitutionality of its State's visitation statutes when it considered only the rights of parents and third parties and ignored the rights of the children. Its analysis may have been appropriate had the issue involved the use of a parent's car or an easement on the parent's real estate.[2] Unlike issues involving rights, this case involves children--persons who are "born or naturalized in the United States,..." U.S. CONST. amend. XIV, § 1.

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[2] It is important to note that this analogy refers to the temporary enjoyment of a car or real estate rather than the dominion over them. Likewise, visitation statutes refer only to temporary periods of time during which a child and person close to the child are authorized to spend together after a determination has been made that the visits are in the best interests of that child. Visitation statutes do not involve full care, custody and companionship of a child. Instead, they involve only limited amounts of time with the child after a judicial determination that such visits are in the child's best interest.

A. *The Washington Supreme Court Overlooked The Constitutional Rights of Children.*

1. Children Have Constitutional Rights That Must Be Considered When Analyzing The Constitutionality Of Visitation Statutes.

The plain language of the Fourteenth Amendment confers Due Process Rights upon "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof...." and protects citizens when a State makes or enforces any law that "deprive[s] any person of life, liberty or property, without due process of law; []or den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Washington court's decision curtails the liberty of children to maintain relationships with grandparents and other family members. The Fourteenth Amendment prohibits the State from enforcing laws that abridge the privileges of its citizens; it must be applied to all citizens, including children. The Court must protect the child's right to continue associating with third persons, including grandparents, when that association is in the best interest of the child.

This Court has acknowledged equal protection and due process rights for children in many situations. *See DeShaney v. Winnebago Dept. Soc. Serv.*, 489 U.S. 189

(1989) (the Fourteenth Amendment protects children from unwarranted governmental, not family, intrusions on their liberty); *Clark v. Jeter*, 486 U.S. 456 (1988) (illegitimate children have a right to child support); *Martinez v. Bynum*, 461 U.S. 321 (1983) (residence requirement statutes could not be applied in the same manner to children in the custody of their parents as opposed to children who were in college); *Board of Education v. McCluskey*, 458 U.S. 966 (1982) (minor student was entitled to Due Process Rights prior to suspension from school); *Goss v. Lopez*, 419 U.S. 565 (1975) (a child facing temporary suspension from a public school has property and liberty interests under the Due Process Clause); *In re Gault,* 487 U.S. 1 (1967) (a juvenile is entitled to Due Process Rights when in State custody in a delinquency matter). Likewise, a child's right to maintain nurturing relationships, which are in his or her best interest, must receive constitutional protection. It is to view the constitutionality of visitation statutes with blinders if acknowledging only the competing rights of parents and third parties without consideration of the best interest of the child. To do so otherwise equates children with chattel.

2. The State May Act *In Parens Patriae* To Protect The Child's Best Interest.

Children require protection to preserve their emotional and physical well-being. As this Court noted in *Prince v. Massachusetts*, 321 U.S. 158 (1944):

> [T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the State as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways ... [T]he State has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and a religious conviction.

Prince, 321 U.S. at 166-67 (citations omitted). The Court subsequently balanced the State's ability to require children to attend public schools with a parent's First Amendment right to free exercise of religion, concluding that the state's *parens patriae* power must be balanced against the First Amendment's provision for the free exercise of religion. *See Wisconsin v. Yoder*, 406 U.S. 205, 229-230 (1972). In *Yoder*, the Court concluded that freedom of religion would control unless the physical or mental health of the child would, as a result, be harmed. *See Id.* at 230. Clearly there must be consideration of the child and his or her needs in order to make a determination of the impact on the child should the court fail to intervene.

In the case *sub judice*, the Troxel children will face adverse consequences should their grandparents be precluded from even having standing to raise the issue of whether visitation would be in the children's best interest. Finding Washington's visitation statute unconstitutional would sever the bond between the children and their grandparents, thus resulting in adverse consequences to the

child, without *any* consideration of the constitutional rights of the child. The Court's position in *Prince* allowed a State to restrict parents' absolute control over their children to "guard the general interest in youths' well-being." *Prince*, 321 U.S. at 166. Prevention of the severance of a loving bond between child and grandparent is precisely the "matter[] of conscience" whereby the *Prince* Court authorized a State to act. *Id.* at 167.

3. Children's Constitutional Rights to Due Process should be Defined in Terms of Their "Best Interests."

"First, we take the view that the law must make the child's needs paramount...It is in society's best interest." JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 7 (MacMillan Publishing Co., Inc., 1979). The "best interest of the child" standard should guide both courts' and legislatures' recognition of the constitutional rights of children as paramount. Although, at first glance, the best interest of the child standard may seem vague, the standard can be uniformly applied through the examination of several factors to be considered in a judicial determination of the best interests of the child.

The American Bar Association has promulgated a seven part test to determine whether grandparent visitation is in the child's best interest. ABA Commission on Legal Problems of the Elderly, *ABA Policy Resolution and*

Comments on Grandparent Visitation (October 2, 1991). Those factors include the following:

> (a) The nature and quality of the relationship between the grandparent and the child, including such factors as whether emotional bonds have been established and whether the grandparent has enhanced or interfered with the parent-child relationship;
>
> (b) whether visitation will promote or disrupt the child's psychological development;
>
> (c) whether visitation will create friction between the child and his or her parent(s);
>
> (d) whether visitation will provide support and stability for the child after a nuclear family disruption;
>
> (e) the capacity of the adults involved for future compromise and cooperation in matters involving the child;
>
> (f) the child's wishes, if the child is able to freely form an expressive preference; and,
>
> (g) any other factor relevant to a fair and just determination regarding visitation.

Id. at Lines 23-37. Furthermore, many state courts have required the examination of a child's best interest in determining the constitutionality of grandparent and third party visitation. *See Custody of H.S.H.-K*, 533 N.W.2d 419 (Wis. 1995) (rejecting the biological parent's argument of absolute autonomy in determining who shall visit her child, and employing the court's equitable powers

to grant visitation in the absence of statutory authority, where a parent-like relationship exists); *King v. King*, 828 S.W.2d. 630 (Ky. 1992) (holding that the right to raise children without governmental interference is not inviolate); *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985) (recognizing that the best interest determination primarily protects the right of the child to know his or her grandparents); *In re Sumey*, 621 P.2d 108 (Wash. 1980) (infringement upon a parent's right to care for their child must be balanced against the best interest of the child).

The judicial examination of the best interest factors in every petition for visitation will ensure that the constitutional rights of the child are properly considered. Perpetuating unassailable parental autonomy fails to recognize the existence of constitutional rights in children, equating children with property.

B. *Visitation Statutes Do Not Impermissibly Interfere With A Parent's Fundamental Interest In The Care, Custody And Companionship Of A Child.*

The Washington Supreme Court failed to make an important distinction. The majority relied heavily upon cases that involved full custody of the child or serious interference with the parent's right to free exercise of religion. *Cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (involving an absolute termination of all parental rights); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (restricting a parent's First Amendment right to free exercise of

religion); *Stanley v. Illinois*, 405 U.S. 645 (1972) (attempting the termination of all parental rights of an unwed father without proper notice); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (hindering a parent's right to free exercise of religion). In stark contrast, visitation statutes entail only a temporary and infrequent interference with a parent's care and companionship of the child. The visitation statute does not alter the legal custody rights of the parent.

Further, the constitutional protection granted a parent is not based solely, or even primarily, on the biological link. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life' through the instruction of children ... as well as from the fact of blood relationship.

Id. (quoting *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (citation omitted)). "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship." *Smith*, 431 U.S. at 844. It is this principle upon which the Court must uphold the rights of children and their grandparents and other persons to whom they are bonded, to continue their loving relationships and emotional attachments.

Furthermore, the Washington statute does not guarantee visitation by third parties, including grandparents. Instead, the statute only provides standing for a party to demonstrate that visitation with the child is in the child's best interests.[3] The statute does not automatically grant visitation to a third party; instead, a petitioning party must meet its burden by establishing that visitation is in the child's best interest. To find such a statute unconstitutional would deny due process to the child by abolishing the very forum in which the child's rights can be represented and best interest ascertained.

II. PUBLIC POLICY CONSIDERATIONS REGARDING CHILDREN'S BEST INTERESTS REQUIRE THAT VISITATION STATUTES BE UPHELD AS CONSTITUTIONAL.

A. *Family Dynamics Have Changed Over Time Requiring The Existence Of Visitation Statutes.*

Our society has seen many changes, especially in recent years. Changes in the family structure have affected

---

[3] In 1996, RCW 26.10.160(3) read as follows:

> Any person may petition the court for visitation rights at any time including, but not limited to, during custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

the lives of children, who less and less often live in a "traditional family." As the family changes, so also should the law. These changes in the dynamics of the modern family beg for an iteration of the rights not just of biological parents, but of children and the persons in their lives who are important to them. In recognition of the changes in the family, all the states have adopted statutes allowing visitation, in some form, by grandparents. The Court must not take this important resource away from children, but must uphold their right to continue their relationships with their grandparents.

Society's modern families not longer exist in traditional family units. There were approximately 7 million single-parent families in 1990. U.S. Bureau of the Census, Current Population Survey (1993). In that same year, single-parent families constituted 28% of all families in America. *See id.* Additionally, "[g]randparent-headed households are clearly on the rise, created by teenage pregnancy, incarcerated parents, child abuse, drug and alcohol addiction, death, divorce and illness." ARTHUR KORNHABER, M.D., CONTEMPORARY GRANDPARENTING, 11 (Sage Publications, Inc. 1996). More than 3.2 million children had one or more grandparents residing in their home in 1990 (Census, 1993); since then, that number has nearly doubled, resulting in almost 5.5 million children who lived with a grandparent in the home in 1997. U.S. Bureau of the Census, Current Population Survey (1999). Approximately 7.7% of all children in the United States live with a grandparent in the home. *See id.* This number increased by 40% between 1992 and 1998. *See id.* In addition to the almost one in twelve children who live with a grandparent, there are millions more that have strong,

nurturing relationships with their grandparents even though they do not reside with them.

In addition, the mere change in life expectancy of adults in America is increasing the number of grandparents in our society. The life expectancy in the U.S. in 1900 was only 46. VERN L. BENGSTON AND JOAN F. ROBERTSON, GRANDPARENTHOOD 201 (Sage Publications, Inc. 1985). By comparison, the life expectancy of men in 1985 was over 73 years old, and more than 80 years old for women. *See id.* at 201-02. The trend has continued, resulting in an increase in the number of grandparents. As the statistics demonstrate, grandparents are becoming more involved in raising their grandchildren. This allows for the formation of close familial bonds between children and persons other than their biological parent. These bonds must be preserved.

B. *Children Have A Right To Maintain Relationships With Third Parties, Including Grandparents.*

Family units have changed. The number of children who live with relatives other than biological parents has increased by 16% since 1981. U.S. Bureau of the Census, Current Population Survey (1993). As such, grandparents serve an important role in lives of their grandchildren. "The nurturing role of grandparents is twofold--indirect, by supporting the child's parents, and direct, by caring for the child." VERN L. BENGSTON AND JOAN F. ROBERTSON,

GRANDPARENTHOOD 164 (Sage Publications, Inc. 1985).

The nurturing role of grandparents in raising grandchildren has become more frequent and more direct. This change in the structure of the American family has been accompanied by changes in American law. Common law traditionally afforded no right to visitation for grandparents. However, since 1965, all fifty states have enacted statutes that allow grandparents the right to petition for visitation with their grandchildren. *See* Statement of John H. Pickering, Chair, *ABA Commission on Legal Problems of the Elderly*, (Hearing before Select Committee on Aging, U.S. House of Representatives, October 2, 1991). In fact, Congress enacted legislation last year to protect the visitation rights of grandparents whose grandchildren move to a state which may have a different visitation law. *See* 28 U.S.C. § 1738A(b)(9) (1998).

Despite the existence of such statutes, the law varies tremendously in each state, resulting in courts "beginning to test the efficacy of the various statutes and to define the aspects of grandparent visitation rights not clearly addressed by statute." G. Stevens & G. Sugars, *Legal Overview of Grandparents' Visitation Rights*, Congressional Research Service, Library of Congress (1987). The inconsistency in grandparents' visitation rights between states has left both grandchildren and grandparents in the dark regarding the nature and extent of their rights to form and continue caring relationships with one another.

The incongruence among grandparent visitation laws requires uniformity. This Court should acknowledge

not just the rights of biological parents, but of both the children and grandparents who have developed strong, loving relationships. Moreover, it is a deprivation of due process rights to allow parents arbitrarily to sever the familial bonds between grandchild and grandparent without even so much as a hearing to determine what is in that child's best interest. As the Indiana Court Appeals prudently remarked: "There is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent of the unique relationship that ordinarily exists between those individuals." *Sightes v. Barker*, 684 N.E.2d 224, 231 (Ind. App. 1997). Washington's statute would not allow this undesirable result.

The visitation statute at issue promotes a child's right to continue nurturing relationships (should the child be fortunate enough to have such relationships) with individuals that have been instrumental in the development of that child. The "best interest" hearing serves to balance the rights of the parent with the rights of the child and petitioning third party. The statute does not impermissibly interfere with the parent's right to autonomy in raising his or her child. The statute does not create a right to visitation; rather, it creates a right *to petition* the court for visitation. Pursuant to Washington's statute, it is only after the child's rights are examined in such a hearing, and a best interests finding is made, that an order for visitation could be issued. Furthermore, an order for visitation is not a final order. Such orders are subject to future modification or revision in accordance with the best interest of the child. Thus, the temporary and flexible effects of Washington's visitation statute do not

impermissibly interfere with a parent's fundamental right to autonomy in child-rearing decisions.

CONCLUSION

For the reasons stated above, Grandparents United respectfully requests that this Court reverse the decision of the Washington Supreme Court and find RCW 26.10.160(3) constitutional. Furthermore, Grandparents United urges this Court to recognize and iterate the constitutional rights of minor children in maintaining beneficial relationships, through visitation with their grandparents and other caregivers, when such visitation is in the best interest of the child.

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v.

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Respondent.

On Writ Of Certiorari
To The Supreme Court Of Washington

BRIEF *AMICUS CURIAE* OF THE SOCIETY OF CATHOLIC SOCIAL SCIENTISTS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Society of Catholic Social Scientists ("SCSS") respectfully submits this *amicus curiae* brief in support of the Respondent, Tommie Granville. We believe the question presented in this case has serious implications for American law and public policy relating to the rights of parents, the integrity of the family, the freedom of religion, and the powers of government.

SCSS is an interdisciplinary association of Catholic social scientists. Its purposes are to pursue and produce knowledge about the social order; to evaluate contemporary social-science work in light of Catholic social teachings; to apply these teachings to the challenges posed by modern society; to encourage distinctively Catholic scholarship in the social sciences; and, where appropriate, to put the tools of social science at the service of the Church's evangelizing mission. These purposes reflect and respond to Pope Pius XI's call over 50 years ago for "the building up of a true Catholic social science." Pope Pius XI, *Reconstructing the Social Order* 19-20 (1931).

The SCSS publishes the only interdisciplinary Catholic social-science journal in North America – *The Catholic Social Science Review* – as well as other research-oriented

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[1] The parties have consented to the filing of this *amicus curiae* brief. Letters to this effect have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief. *See* S. Ct. Rule 37.6.

publications;[2] sponsors periodic conferences and symposia; issues statements and papers on important social and political questions; recognizes and awards outstanding contributions to a distinctively Catholic approach to the social sciences; and assists students who are interested in integrating social-science careers with the faith and tradition of the Catholic Church.

SCSS is particularly interested in protecting, through research, scholarship, and advocacy, the dignity and rights of the family. This commitment reflects the Catholic Church's position that the family is "the first and vital cell of society" and that "[i]t is from the family that citizens come to birth and . . . find the first school of the social virtues that are the animating principle of the existence and development of society itself." Vatican Council II, *Decree on the Apostolate of Lay People* 11 (1965). We follow the Catholic Church – and the precedents of this Court – in believing that it is "a grave and pernicious error" to think that government "should at its option intrude into and exercise control over the family" and in holding that such intervention is justified only when "there occur grave disturbances of mutual rights." Pope Leo XIII, *The Condition of Labor* 14 (1891). It is, in other words, a fundamental principle both of Catholic social teaching and of constitutional law that "the child is not the mere creature of the state." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *see also, e.g., Catechism of the Catholic Church* Sec. 2202 (The family is "prior to any recognition by public authority").

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[2] *See, e.g.*, Stephen M. Krason & Paul C. Vitz, *Defending the Family: A Sourcebook* (1998).

SUMMARY OF THE ARGUMENT

The fundamental rights of parents to direct and control the upbringing of their children and the autonomy of the family have been recognized time and again by this Court. These rights and this autonomy are not creatures of positive law, but are grounded in the natural moral order. The family is the "building block" of civil society and has as its natural end, or *telos*, the nurturing and development of flourishing human persons and good citizens. Given this natural purpose, the rights of the family and of parents to pursue this end must be respected and protected by public authority. In particular, government must not disrupt, intervene in, or second-guess parents' decisions about child-rearing except in grave cases where it is necessary to prevent real harm.

The history of our Nation's various child-welfare, or "child saving" movements serve as a warning against excessive government intrusion into parents' decisions, even when such intrusion purports to be motivated by noble goals. There is always the danger that religious, ethnic, cultural, or class-based prejudice will color the "experts' " view of the "best interests" of the child and of parents' competence. Such prejudice clearly tainted the efforts of the early juvenile-justice reformers. In addition, the current sensationalism surrounding the problem of child neglect and the abuses of the child-neglect-reporting system during the last thirty years provide further basis for caution when it comes to second-guessing parents in the name of "child protection." Given what we know about the costs of, and harm caused by, overzealous intrusion in the family and unsubstantiated reports of abuse, this is certainly not the time for this Court to in

any way undermine the *fundamental* nature of parents' constitutional rights.

ARGUMENT

I.

The Government Should Not Second-Guess or Interfere with the Decisions of Competent, Non-abusive Parents Concerning the Education, Upbringing, and Welfare of Their Children.

This Court has held and re-affirmed that the rights of parents to direct and control the upbringing of their children without unjustified intrusion or oversight by the State are fundamental and sit at the heart of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. As this Court observed in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), "[t]he history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of the children is now established beyond debate as an enduring American tradition." Indeed, parents' rights and family autonomy are not merely "enduring American tradition[s]," but are "essential, basic rights of man." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). It is therefore "cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Ibid.*; *see generally, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Santosky v. Kramer*, 455 U.S. 745 (1982).

We believe that the constitutional pedigree of parents' rights are well established, as is the rule that any law that infringes on these rights must be narrowly tailored to serve a compelling state interest. In this *amicus curiae* brief, we hope to assist the Court by focusing on *foundational* arguments that are consonant with, and provide additional support to, the relevant constitutional principles.

A. The Foundations of Parents' Rights.

Common sense and human experience reveal that parents' responsibility for and right to direct the upbringing of their children are not merely conventions, but are grounded in the natural order of things. *See, e.g., Catechism of the Catholic Church* Sec. 2207 ("The family is the *original cell of social life.*") (emphasis in original). These objective facts supply parents with the moral right to exercise their authority – within the limits of reason and morality – free from unwarranted interference by outsiders, including government. *See id.*, at Sec. 2209 ("[L]arger communities should take care not to usurp the family's prerogatives or interfere in its life."); *see also, e.g.*, John Locke, *Two Treatises of Government* 348-49 (Peter Laslett ed., 1960) (3d ed. 1698) ("The power . . . that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood.").

These claims are neither novel nor sectarian. Philosophers have long recognized that the family is the fundamental "building block" of human society: "Nature has

instituted this small but fundamental group, first of the natural societies and the most basic unit of the state, for the purpose of reproducing the human species." Rafael T. Waters, "The Basis for the Traditional Rights and Responsibilities of Parents," *in* Stephen M. Krason & Robert J. D'Agosino, eds., *Parental Rights: The Contemporary Assault on Traditional Liberties* 20 (1988). Moreover, "the family is the necessary productive unit requiring the complementary abilities, personalities, and contributions of both parents so that the child can learn and develop habits . . . and moral virtues." *Id.*, at 22. The purpose, or *telos*, of the family imposes duties upon parents to accept and exercise responsibility for the process of producing – of *creating* – new persons and new members of civil society. *Id.*, at 22-23; *see also Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (Constitution protects the integrity of the family because of "the role it plays in 'promoting a way of life' through the instruction of children"). This end toward which the family – the primary natural association – is directed is the basis for the moral rights and responsibilities of parents.[3]

Parents' natural moral duties, obligations, and responsibilities carry with them moral rights which the state is obligated to respect and protect. This is because the imposition of a moral duty on a person requires permitting that person to comply with it, and one person's enjoyment of a moral right imposes a duty on other

[3] On the notion that the natural *telos* or "end" of a thing is the lodestar for moral claims *about* that thing, *see, e.g.*, Aristotle, *The Nicomachean Ethics* Book VII, c.8, 1115a; St. Thomas Aquinas, *Summa Theologica* I-II, q. 90, a.1.

persons to respect that right. *See* Pope John XXIII, *Peace on Earth* 28-29 (1963); Thomas J. Higgins, *Man As Man: The Science and Art of Ethics* 226-227 (1992); *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("[O]ur constitutional system . . . [has] asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.") (citations and internal quotation marks omitted). Parents' rights, then, are grounded in the fact that their natural moral obligations "cannot be met without the possession of rights with respect to other members of the community." Waters, *supra*, at 25.

Again, the natural purpose of the family, and therefore the obligation of parents, is to create, shape, and nurture new members of the human family and the civic community. Parents and families are not only morally entitled, but are *by nature* better able, to carry out these tasks than is any other entity or institution:

> The mutual love of the parents, the aid they can give to each other and the intimacies they share, are all a proper climate for the [child]. . . . The struggle for its due completion which every being seeks . . . is culminated best in family life where there exist two people who love the offspring, more than anyone else can, by a deeply ingrained attitude established in the nature of the parents. . . . His parents love him more than . . . the state possibly could love him. Therefore, they are best fitted to supervise the development of their own offspring.

Waters, *supra*, at 26-27; *see also Parham*, 442 U.S. at 602 ("[H]istorically it has been recognized that natural bonds of affection lead parents to act in the best interests of

their children.") (citations omitted).[4] This common-sense fact is not surprising. *See Smith*, 431 U.S. at 844 (noting the "emotional attachments that derive from the intimacy of daily association"). As Pope John Paul II has observed, "public agencies . . . are dominated more by bureaucratic ways than by concern for serving their clients. . . . It would appear that needs are best understood and satisfied by people who are closest to them." Pope John Paul II, *The Hundredth Year* 48 (1991).

It follows that the state violates a fundamental moral principle, upsets the proper ordering of civil society, and undermines the natural end of the family when it substitutes its judgment for parents', except where absolutely necessary, in special and difficult circumstances. *See Catechism of the Catholic Church* Sec. 2209 ("The family must be helped and defended by appropriate social measures. *Where families cannot fulfill their responsibilities*, other social bodies have the duty of helping them and of supporting the institution of the family."). This is the heart of the principle of *subsidiarity*, which holds that "[i]t is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do." Pope Pius XI, *supra*, at 79; *see also* E.F. Schumacher, *Small is Beautiful: Economics as if People Mattered* 244

[4] These are, obviously, general principles. *Of course* it is true that *some* parents may be unable or unsuitable to raise their children, but this fact does not undermine the suitability and rights of parents, as a general matter, to direct and control the upbringing of their children.

(1973).[5] The subsidiarity principle applies to family-state relations as well as to relations between different levels of government: "Following the principle of subsidiarity, larger communities should take care not to usurp the family's prerogatives or interfere in its life." *Catechism of the Catholic Church* Sec. 2209.

Not only do parents enjoy a superior right to the state in raising their own children, they must enjoy such a right with respect to private third parties – even well-meaning, capable, and loving third parties. Even extended family members do not share the same natural intimacy with children that parents do. The bond between children and their extended family is, of course, real and precious and – all things being equal – this bond should be cultivated and nurtured. But this bond is simply not interchangeable, either in biology or in moral right, with that between parents and their children. The integrity of the family and the rights of parents are fundamental, objective, and natural facts, and the state should set itself against them only in cases of the gravest need.

[5] This principle of subsidiarity overlaps considerably with and promotes many of the same goods as does our constitutional federal system of dual sovereignty. *See, e.g.*, W. Gary Vause, "The Subsidiarity Principle in European Union Law – American Federalism Compared," 27 Case W. Res. J. Int'l L. 61 (1995); George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," 94 Colum. L. Rev. 331 (1994).

B. The History and Tradition of Parents' Rights.

The philosophical arguments sketched above have been embraced in our legal tradition. It is well established that "parental rights were ardently upheld at common law." John W. Whitehead, *Parents' Rights* 85 (1985). Indeed, "the common law recognized parental rights as a key concept . . . [and viewed] the family as a basic social, economic, and political unit"; parental rights were "even more fundamental than property rights." Bruce C. Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their 'Rights,' " 1976 B.Y.U. L. Rev. 605, 615. As one court proclaimed, nearly 150 years ago:

> No teacher . . . has any authority over the child, except what he derives from its parent or guardian; and that authority may be withdrawn whenever the parent, in the exercise of his discretionary power, may think proper. . . . The doctrines of the common law are in accordance with these principles. It is the duty of the parent to maintain and educate the child, and he possesses the resulting authority to control it in all things necessary to the accomplishment of the parent over the child, except that it must not be exercised in such a manner as to endanger its safety or morals.

Commonwealth v. Armstrong, 1 Pa. L.J. Rep. 393, 395-397 (1842). In our legal tradition, parents' rights have long been recognized as "inherent, natural right[s], for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed." *Lacher v. Venus*, 188 N.W. 613, 617 (Wis. 1922). This longstanding

solicitude for parents' rights does *not*, we submit, simply reflect a notion of children-as-property,[6] but rather a commitment to the role of the family as the fundamental and autonomous unit of civil society, within which parents and their authority are protected precisely in order that they may discharge their obligations to their children *and to the greater common good*.

It is important to recognize in this regard that our tradition, while committed to preserving family autonomy, rejected the extreme position taken in more ancient legal systems – in particular, the Roman doctrine of *paterfamilias* – which gave fathers complete control over the life and death of their children. As Blackstone put it, "[t]he power of a parent, by our English laws, is much more moderate; but still sufficient to keep the child in order and obedience. He may *lawfully* correct his child, being under age, *in a reasonable manner*; for this is for the benefit of his education." 1 William Blackstone, *Commentaries on the Laws of England* 440 (Oxford Reprint 1966). That said, American courts for most of our history recognized that "[p]arental power . . . is essentially plenary. This means it should prevail over the claims of the state, other outsiders, and the children themselves 'unless there is some compelling justification for interference.' " Whitehead, *supra*, at 91-92.

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[6] *Cf.* Barbara B. Woodhouse, "Who Owns the Child: *Meyer* and *Pierce* and the Child as Property," 33 Wm. & Mary L. Rev. 995, 997 (1992) ("*Meyer* and *Pierce* constitutionalized a narrow, tradition-bound vision of the child as essentially private property.").

The traditional rationale and foundation for the respect accorded parents' rights in our constitutional tradition reflects not only the Framers' libertarian commitment to natural, individual rights, but also their republican recognition that the family is the basis for society and the seed-bed of civic virtue. *See* Higgins, *supra*, at 428 (The family is the "the cell of society, biologically and morally; that is, future citizens are prepared for life in society by the family . . . [T]he family is first among natural societies."). It is families, and not de-contextualized, atomistic individuals, that contribute most meaningfully to civil society, because individual citizens' identities, morality, and consciousness originate in, and are nurtured by, the family.

These claims accord not only with Catholic teaching but with Western traditions generally. Aristotle identified the importance of the family to the creation of civic virtue and political well-being over 2,300 years ago. And, as was suggested above, this ancient, foundational commitment to family integrity – grounded in the natural law – continued in our common-law and constitutional traditions. *See generally* Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harv. L. Rev. 149 (1928); Russell Kirk, *The Roots of American Order* (1974) (outlining roots of America's constitutional heritage in the ancient and medieval natural-law traditions).

It is, of course, not this Court's task to expound and apply the natural law. But this Court's properly limited role does not detract from the historical fact that natural-law principles and reasoning were absorbed into our Constitution's guarantees and into the claims of the Declaration of Independence. And as they were absorbed,

they were refined. This Court need not be concerned that, because of their natural-law basis, parents' rights are vague, subjective, or nonjusticiable. They are not. The deeply rooted, traditional protections accorded parents' rights and family integrity are well-established, and their outlines no less clear than those of the other fundamental rights protected by the Constitution.

• • •

We believe that the decision of the Washington Supreme Court below, which resoundingly held that the "family entity is the core element upon which modern civilization is founded" (Pet. 14a), and therefore that "the state may interfere [with the constitutional right to rear one's child and the right to family privacy] only 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens,' *Yoder*, 406 U.S. at 234" (Pet. 17a), was correct and should be affirmed. We have attempted to show that our commitment to the integrity, dignity, and autonomy of the family as the fundamental unit of civil society, charged with the solemn duty of producing well formed citizens and human persons, is one that coheres fully with and has been embraced by this Nation's legal traditions.

II.

Parents' Rights and Family Integrity Are Being Undermined by Certain Trends in Contemporary American Law and Policy and This Court Should Therefore Reaffirm That These Rights Are Fundamental.

Because parents' rights to direct the upbringing of their children are fundamental, any States' laws that limit

these rights must undergo strict judicial scrutiny. We agree with the Washington Supreme Court that the broad third-party visitation laws at issue here cannot survive this Court's review.[7] In what follows, we attempt to bring to this Court's attention certain social trends that make all the more crucial a clear re-affirmation of the fundamental nature of the rights this Court vindicated in *Pierce, supra,* and *Meyer, supra.*[8]

A. The *Parens Patriae* Doctrine and the "Child Savers."

The rights of parents have never been *absolute* in our tradition. *See generally,* Allan C. Carlson, *Family Questions: Reflections on the American Social Crisis* 242 (1988) ("[A]longside th[e] affirmation of parental rights, the law also recognized the power of the courts to intervene into families and take away children in order to the protect the interests of the larger community."). As the court below recognized, family integrity is subject to the state's

[7] We do not believe this Court needs to decide whether a more cautious and less intrusive "grandparent-visitation" law could survive strict scrutiny.

[8] Some commentators have suggested that *Pierce* and *Meyer,* and the fundamental rights they upheld, are no longer useful in today's society. *See, e.g.,* Abner S. Greene, "Why Vouchers Are Unconstitutional, and Why They're Not," 3 Notre Dame J. of Law, Ethics, and Pub. Pol'y 397 (1999); Stephen Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 Harv. Educ. Rev. 76 (1976). We reject the dangerously statist implications of such claims.

police and *parens patriae* powers (Pet. 15a-16a).[9] These powers, when judiciously exercised in pursuit of the common good, need not undermine parents' rights. But this Court has emphasized that, precisely because of the central importance of family integrity, the state may exercise these powers only when necessary to redress or prevent real *harm* to a child. *See* Pet. 16a (citing *Yoder,* 406 U.S. at 206).

The *parens patriae* power is *not* a license for re-shaping society by second-guessing parents. We believe that certain excesses in the exercise of the *parens patriae* power today threaten parents' rights and, more broadly, the integrity, privacy, and well-being of families. These excesses – committed in the name of protecting children – have often, in fact, harmed children, not simply by exposing them to the nightmare of arbitrary government action but also by impairing their natural development, removing them from their families, and undercutting their parents' authority.

History cautions against using the *parens patriae* power to justify excessive state intervention. In the American colonial period, some local courts, following English practice, intervened in family affairs and even removed children from their parents if these courts found the

[9] The phrase *parens patriae* literally means "parent of the country." *See generally* Douglas R. Rendleman, "*Parens Patriae*: From Chancery to The Juvenile Court," 23 S.C. L. Rev. 205 (1970). The doctrine initially developed in medieval chancery courts. It was first used in an American court in the case of *Ex Parte Crouse,* 4 Whart. 9 (Pa. 1838), where the court used the term to justify the continued detention of a girl in a "House of Refuge" over the objections of her father.

parents unfit or decided that the children were not being raised in an approved manner. *See generally* Michael D. Rosenbaum, "To Break the Shell Without Scrambling the Egg: An Empirical Analysis of the Impact of Intervention Into Violent Families," 9 Stan. L. & Pol'y Rev. 409, 411 (1998) ("[L]ocal authorities had the authority to remove abused children from parental guardianship, a right to act against parents on behalf of children derived from the medieval doctrine of *parens patriae*."); Carlson, *supra*, at 242 (describing 1646 statute enacted by Virginia's House of Burgesses that authorized taking children from parents to work in flax houses). In a similar vein, the 19th Century reform-school movement promoted laws which removed delinquent or "ill-treated" children from their usually urban homes to rural reform schools. The families targeted for the "benefit" of the state's attention were typically poor immigrants. As in colonial New England, the state was viewed by some as an appropriate mechanism for re-shaping family life in the interest of a more homogenous common good. *See generally, e.g.*, Carlson, *supra*, at 243 ("The reform school movement which swept the nation during the nineteenth century represented a bonding of traditional values to coercive social engineering."); Sanford J. Fox, "Juvenile Justice Reform: A Historical Perspective," 22 Stanford L. Rev. 1187, 1206-1209 (1970); Anthony M. Platt, *The Child Savers: The Invention of Delinquency* 44-49 (1969).

The often oppressive "child saving" movement gained its strength from the *parens patriae* doctrine, which was invoked to justify removing children from their parents – with minimal procedural protections – whenever they were judged unworthy to rear their children. *See*

generally, Platt, *supra*, at 3-4, 98-99; Susan R. Bell, Comment, "Ohio Gets Tough on Juvenile Crime: An Analysis Of Ohio's 1996 Amendments Concerning the Bindover Of Violent Juvenile Offenders to the Adult System and Related Legislation," 66 U. Cinn. L. Rev. 207, 208-209 (1998) ("These civic-minded 'child savers' had a two fold agenda that included 'instilling proper civic and moral values' in these children and 'mitigat[ing] the law's often harsh treatment of children.' ") (internal citations omitted). The child-saving movement spurred the development of juvenile courts, which were given the authority to remove children from their parents' care if they determined the children were "probable delinquents." Again, it was mostly children from immigrant, poor, and various minority communities who were targeted. *See* Fox, *supra*, at 1221-1228; Mason P. Thomas, Jr., "Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives," 50 N.C. L. Rev. 293, 323-325 (1972).

The stated methodology of the early juvenile justice courts was therapeutic: parents and children were "clients" and the "the best interests of the child" was the guiding principle. In truth, though, the child-saving movement and its courts were coercive, and sought to reshape their "clients" along the lines of an ideal notion of the American family as determined by middle-class social workers and juvenile court judges. Later, they targeted not just minority groups, but all parents. *See* Carlson, *supra*, at 244-248. Not surprisingly, the "child saving" movement eventually came under criticism, and the juvenile justice system became known for its procedural nightmares, arbitrariness, and cruelty. Indeed, in

1870 the Illinois Supreme Court ruled that, notwithstanding the State's invocation of the *parens patriae* power, the constitutional rights of a 14-year old boy who had been committed to Chicago's reform school were violated: "The State, as *parens patriae*, has determined the imprisonment beyond recall. Such a restraint upon natural liberty is tyranny and oppression." *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 287 (1870). Importantly, the Illinois court grounded its decision in the observation that "[t]he parent has the right to the care, custody, and assistance of his child[.] . . . The duty to maintain and protect it is a principle of natural law. . . . Before any abridgement of the right, gross misconduct or almost total unfitness . . . should be clearly proved." *Ibid.*

Eventually, policy-makers awakened to the danger of using coercive state power, and removing children from their parents, simply to homogenize society in accord with middle-class Protestant norms. Carlson, *supra*, at 249-250; *see* Eric K. Klein, Note, "Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice," 35 Am. Cr. L. Rev. 371, 377 (1998) ("[W]hile it was hoped that the courts would protect delinquent children and serve their best interest, because of the lack of procedural protections, children accused of crimes or even status offenses were often being arbitrarily and unfairly punished."). The abuses and injustices of this system were only halted – or at least curbed – by this Court's landmark decision, *In re Gault*, 387 U.S. 1 (1967), which condemned much of the theory and practice of the "child savers" and their courts. *Id.*, at 16. *Gault* should be read as a warning against an expansive reading of the *parens patriae* power, even when

that power is being invoked by government agents, or well meaning private parties, in the service of what they assure us is a good cause.

B. Present-Day Policies Relating to Child Abuse and Neglect.

As the old, harsh juvenile justice system crumbled – or at least improved – in the wake of *In re Gault, supra*, a new avenue soon opened up for experts' "child saving" impulses. The "newly discovered" problem of child abuse, increased media attention to this issue, and the efforts of scholars, professionals, and activists led to a host of new laws relating to the reporting of and official response to child-abuse accusations. Between 1963 and 1967, every State and the District of Columbia enacted laws requiring reporting of child-abuse cases. *See* Rosenbaum, *supra*, at 412; Carlson, *supra*, at 250-251. Then, in 1974, Congress passed the Child Abuse Prevention and Treatment Act of 1974 (the "Mondale Act"), which opened the door to massive and unprecedented governmental intervention in American families. The Act's generous promises of federal grants prompted state and local governments to set up hundreds of child-protective agencies, ostensibly in response to the hitherto unremarked national epidemic of child abuse and neglect. States were encouraged by Mondale Act funds to pass sweeping statutes which, *inter alia*, required a range of professionals – and, in some States, all citizens – to report even suspicions of abuse to specialized child-protection agencies, and gave blanket immunity from prosecution or civil suit to persons making reports (even if false or exaggerated),

even while making those required to report liable for failing to do so. *See generally*, Douglas J. Besharov, " 'Doing Something' About Child Abuse: The Need to Narrow the Grounds for State Intervention," 8 Harv. J. of Law and Pub. Pol'y 545 (1985). These statutes typically authorized intrusive government intervention in families and investigation of parents on the basis of vague, undefined, and persistently unclarified terms like "abuse" and "neglect." *See* Stephen M. Krason, "Child Abuse: Pseudo-Crisis, Dangerous Bureaucrats, Destroyed Families," *in* Stephen M. Krason & Robert J. D'Agostino, eds., *Parental Rights: The Contemporary Assault on Traditional Liberties* 167-173 (1988).

The Mondale Act and its progeny caused a ballooning of child-abuse and neglect reports, unprecedented state intervention into the family, and – in many high-profile cases – outright destruction of families. Indeed, it is "no coincidence that [many] spectacular child abuse cases emerged shortly after the passage of the Mondale Act, which provides huge increases in funds for child protection agencies and abuse investigators. The appearance of huge amounts of government money produced enormous increases in agencies and staff, which in turn created investigations culminating in accusations of child sex abuse on a scale never seen before." James E. Beaver, "The Myth of Repressed Memory," 86 J. Crim. L. & Criminology 596, 601 (1996) (book review); *see also* Dorothy Rabinowitz, "A Darkness in Massachusetts," Wall St. J., Jan. 30, 1995, at A20; ("That the wave of spectacular child-abuse trials emerged in the 80's was no accident. . . . With the outpouring of government money came a huge

increase in agencies and staffs, which in turn begat investigations and accusations of child sex on a grand scale. An industry had been born.").

Consider these numbers: In 1963, when the first generation of (limited) abuse-reporting laws were enacted, there were 150,000 reports nationwide; by 1972, just prior to the passage of the Mondale Act, there were 610,000; in 1982 – eight years after the Act – there were 1.5 million; and by 1993, there were nearly 3 million. This is an increase of 1857% in thirty years, an increase that cannot be explained by increases in actual abuse or in a massive uncovering of secret neglect. It is now evident that many of these millions of reports were and are completely unsubstantiated. *See generally* Stephen M. Krason, "A Grave Threat to the Family: American Law and Public Policy on Child Abuse and Neglect," *in* Paul C. Vitz & Stephen M. Krason, eds., Defending the Family: A Sourcebook 235-236 (1998).

It appears, ironically, that the expansion of the government's intrusive power into the family has led to a situation even *more* dangerous for at-risk children, as the States' child-protective systems are "overburdened with cases of insubstantial or unproven risk." Besharov, *supra*, at 540; *see also* Krason, "A Grave Threat," *supra*, at 257-258. Moreover, because the post-Mondale Act statutes are often so unclear in defining "abuse" and "neglect" that estimates of the number of reports that are unfounded may *understate* the number of unfounded reports. Krason, "A Grave Threat," *supra*, at 245-250. It could well be, that is, that many perfectly acceptable

parental actions make up a good percentage of the "substantiated" or "founded" claims because agencies arbitrarily determined them to be abusive or neglectful. *See generally* Mary Pride, *The Child Abuse Industry* (1986); Brenda Scott, *Out of Control: Who's Watching Our Child Protection Agencies?* (1994).

The problem of false abuse reports is more than a statistical problem. Many good parents have endured legal difficulties, disruption of their family, social stigma and loss of job opportunities resulting from being placed in state child-abuse registries, loss of their children temporarily or permanently, and even imprisonment – all because of false neglect charges. These human costs are real, and provide a solid basis for caution in this area. *See generally*, Rabinowitz, *supra*; John Merline, "Who's Abusing America's Kids? All Too Often It's Those Trying to Protect Them," Investor's Bus. Daily, Sep. 5, 1995, at A1; Ruth Shalit, "Witch Hunt," The New Republic, June 19, 1995, at 14. Unfortunately, notwithstanding these costs, parents caught up in today's version of the "child saving" movement are often denied the procedural and other protections the Constitution affords criminal defendants as a matter of course and that this Court required in the juvenile courts in *In re Gault*, *supra*. *See generally* Merline, *supra*, at A1, ("In some cases, innocent parents' homes are searched without a warrant, the children are interrogated, strip searched, and temporarily removed from the home altogether – sometimes for years"); Pride, *supra*, at 168-169; Scott, *supra*, at 131-151; *cf. Santosky v. Kramer*, *supra*, at 755 ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.").

* * *

In sum, as a result of the Mondale Act and its progeny, and as a legacy of this Nation's earlier "child saving" movements and present-day media sensationalism, the State's *parens patriae* power has all too often been abused, and the admirable motives of child-protection laws undermined, by bureaucratic agencies and officials who have wrongly assumed a near-plenary power over parents' childrearing practices in the name of combating neglect. Such oppressive intrusion flies in the face of the American constitutional tradition and of the Fourteenth Amendment's "liberty" guarantee.

We emphasize that nothing said here should be taken as questioning the duty of the state to intervene in clear cases of *real* abuse and neglect. Parents' rights are fundamental, but they are not absolute. Still, given that these rights *are* fundamental, the conduct of government and its bureaucrats – whether well-meaning or malevolent – must be held to a demanding standard. The States' laws regarding child-abuse reporting, custody, termination of parental rights, *and third-party visitation* must be subject to *strict scrutiny*. In this case, the Washington Supreme Court correctly determined that, whatever may be said about the importance, generally speaking, of a child's relationship with his or her grandparents, the statutes at issue here are far too broad, and far too intrusive, to satisfy the Constitution's requirements. *See* RCW 26.10.160(3), RCW 26.09.240.

CONCLUSION

For all the foregoing reasons, *amicus curiae* the Society of Catholic Social Scientists urges this Court to affirm the judgment and reasoning of the court below.

Respectfully submitted,

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